Supreme Court, U.S.
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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HARTLEY MARINE CORP., THE OHIO RIVER COMPANY, AND CROUNSE CORPORATION,

Petitioners,

v.

JAMES H. PAIGE III, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Appeals of West Virginia erred by holding that the Northwest Ordinance of 1787 and the Virginia Compact of 1789 no longer have any force or effect, thereby allowing the West Virginia Department of Tax and Revenue to circumvent the provision in each law that the Ohio River shall be "forever free" and "free," respectively, when the Department collected a "use" tax (dedicated to West Virginia's highways) on fuel consumed by vessels traveling on the Ohio River, some of which made no stops in West Virginia.

2. Whether the Federal Government has preempted the ability of West Virginia and other states to impose taxes on fuel consumed by vessels plying the Ohio River and other navigable interstate waterways, through Congress' enactment of 33 U.S.C. § 5, 26 U.S.C. § 4042 and other provisions regulating and maintaining the navigable interstate waterways.

3. Whether West Virginia and other states that border the Ohio River and other interstate navigable waterways may impose a use tax dedicated for state highways on fuel consumed by vessels traveling along the waterway, including vessels that never stop in the state, without violating the Duty of Tonnage, Commerce and Supremacy Clauses of the United States Constitution.

LIST OF PARTIES

The parties to the proceeding below were the same as those mentioned in the present caption, with one exception. Alan L. Mierke, respondent below, was succeeded as State Tax Commissioner of West Virginia by L. Frederick Williams, Jr., who was in turn succeeded by James H. Paige III, Respondent, the current State Tax Commissioner of West Virginia.

Alan L. Mierke is no longer a party as he was a party to the proceeding below in his official capacity only. L. Frederick Williams, Jr. was neither a party to the proceeding below nor a party in the present action.

In the proceeding below, Hartley Marine Corp. was referred to as Hartley Marine Corporation. The corporation's actual name is Hartley Marine Corp. and is so referred to herein.

RULE 29.6 STATEMENT

Petitioner Hartley Marine Corp. is a wholly-owned subsidiary of Midland Enterprises Inc., which is a wholly-owned subsidiary of Eastern Enterprises, a Massachusetts voluntary association. Petitioner Hartley Marine Corp. has no nonwholly-owned subsidiaries.

Petitioner The Ohio River Company is a wholly-owned subsidiary of Midland Enterprises Inc., which is a wholly-owned subsidiary of Eastern Enterprises, a Massachusetts voluntary association. Petitioner The Ohio River Company has no nonwholly-owned subsidiaries.

Petitioner Crounse Corporation is a closely-held corporation with no parent companies and no nonwholly-owned subsidiaries.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

This petition for a writ of certiorari respectfully seeks this Court's review of the judgment of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The July 12, 1996 consolidated opinion of the Supreme Court of Appeals of West Virginia (App. A at 1a-26a) has not yet been reported.

The January 26, 1995 consolidated order of the Circuit Court of Kanawha County, West Virginia for Hartley Marine Corp. (Civil Action Nos. 90-AA-171 and 92-AA-64) and The

Ohio River Company (Civil Action No. 92-AA-91) (App. B at 27a-30a) is unreported. The November 17, 1994 order of the Circuit Court of Kanawha County, West Virginia for M/G Transport Services, Inc. (Civil Action No. 92-AA-67) (App. C at 31a-33a), an order cited by the above order, is unreported. The February 8, 1995 order of the Circuit Court of Kanawha County, West Virginia for Crounse Corporation (Civil Action No. 93-AA-50) (App. D at 34a-36a) is unreported.

The August 14, 1990 and December 30, 1991 decisions of the West Virginia State Tax Commissioner for Hartley Marine Corp. (App. E and F at 37a-77a and 78a-91a) are unreported. The February 19, 1992 decision of the West Virginia State Tax Commissioner for The Ohio River Company (App. G at 92a-107a) is unreported. The January 26, 1993 decision of the West Virginia State Tax Commissioner for Crounse Corporation (App. H at 108a-125a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on July 12, 1996. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Northwest Ordinance of 1787, Articles of Compact, art. IV (reenacted in 1789), provides:

> *The navigable waters leading into the Mississippi* and Saint Lawrence, and the carrying places between the same, *shall be* common highways, and *forever free*, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, *without any tax, impost, or duty therefor*.

U.S.C.A. Const. Art. 1 The Organic Laws of The United States pp. 17, 22 (emphasis added).

The Virginia Compact of 1789, § 11, provides:

> *[T]hat the use and navigation of the river Ohio*, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth lies thereon, *shall be free* and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed state on the river as aforesaid shall be concurrent only with the states which may possess the opposite shores of the said river.

13 Henning's Stat. at L., c.14 (emphasis added).

The Duty of Tonnage Clause of the United States Constitution, U.S. Const., art. I, § 10, cl. 3, provides: "No State shall, without the Consent of Congress, lay any Duty of Tonnage . . . ."

The Supremacy Clause of the United States Constitution, U.S. Const., art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Commerce Clause of the United States Constitution, U.S. Const., art. I, § 8, cl. 3, provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Section 5 of Title 33 of the United States Code, as relevant here, provides:

> *No tolls or operating charges whatever shall be levied upon* or collected from *any vessel*, dredge, or other water craft *for passing through any* lock, canal, *canalized river*, or other work for the use and

> benefit of navigation, now belonging to the United States or that may be hereafter acquired or constructed; . . . .

33 U.S.C. § 5 (emphasis added).[1]

Relevant portions of the West Virginia statutes are set forth at App. I at 126a-131a.

STATEMENT

The United States of America was formed when the Declaration of Independence was signed on July 4, 1776. Our Government commenced operations under the Constitution on March 4, 1789. During the 13-year period from 1776 to 1789, we were governed by the Articles of Confederation and by other enactments, including the Northwest Ordinance of 1787.

The Northwest Ordinance, with respect to interstate commerce, is still in effect. *Economy Light & Power Co. v. United States*, 256 U.S. 113, 119 (1921). That Ordinance established the doctrine (the "Free Rivers Doctrine") that interstate commerce along rivers (the principal means of interstate commerce at that time) shall be "forever free." Two hundred years of jurisprudence have continued the Free Rivers Doctrine. When the Constitution was adopted, the Free Rivers Doctrine was one of the reasons for the inclusion of the Duty of Tonnage Clause. When the Virginia Compact was enacted on December 18, 1789, the Free Rivers Doctrine was embodied in the provision that the use of the Ohio River would be "free." The Virginia Compact is still in effect. *Wedding v. Meyler*, 192 U.S. 573, 582 (1904).

In *Gibbons v. Ogden*, 22 U.S. 1 (1824), this Court expanded the Free Rivers Doctrine by striking down a New York statute that excluded Federally licensed boats from operating in New York waters. Congress expressly set forth the Free Rivers Doctrine when it enacted the Rivers and Harbors

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[1] The Ohio River is a canalized river. *See United States v. Cress*, 243 U.S. 316, 326 (1917).

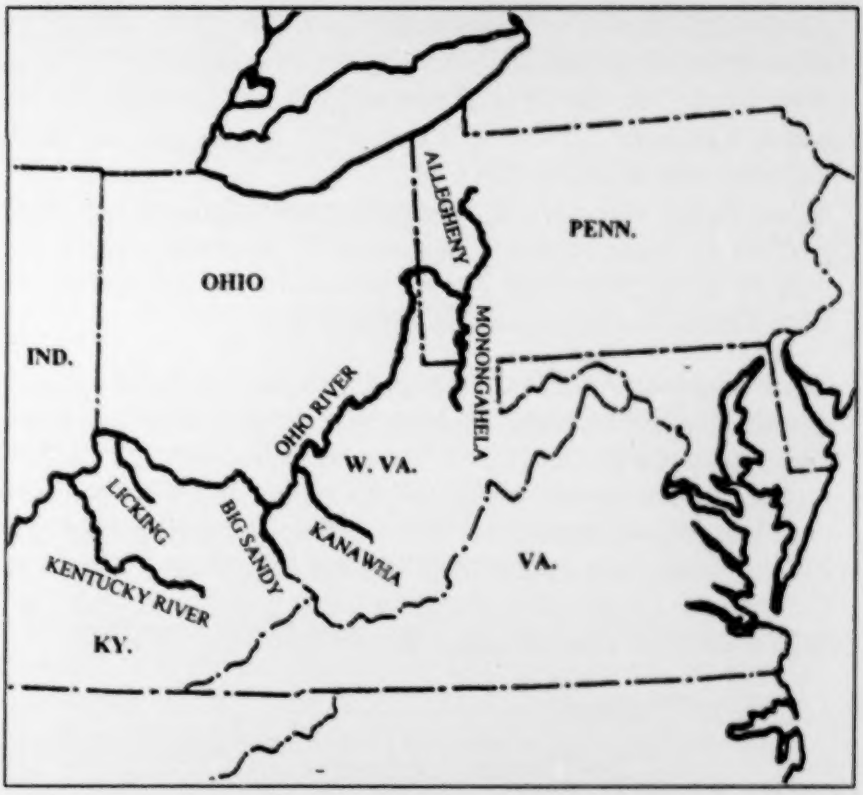
Appropriation Act of 1884 (now 33 U.S.C. § 5), which prohibited the imposition of any "tolls and operating charges whatsoever" on the Ohio River and other waterways. In *Helson v. Kentucky*, 279 U.S. 245 (1929), a case on "all fours" with the case at hand, this Court applied the Free Rivers Doctrine when it held that the imposition of a fuel use tax on the portion of fuel consumed in Kentucky by an interstate ferry was an unconstitutional burden on interstate commerce. The Free Rivers Doctrine continues to this day.

Relying on one of its own decisions, the Supreme Court of Appeals of West Virginia has decided that the Free Rivers Doctrine does not apply in West Virginia. It summarily rejected the continued validity of the Northwest Ordinance and the Virginia Compact, it ignored or misinterpreted over 200 years of Duty of Tonnage Clause, Supremacy Clause and Commerce Clause jurisprudence, and it declared that interstate river traffic is fair game for the state's tax collector.

1. The Facts

a. Petitioners' businesses

The facts are not in dispute. This case involves three Petitioners, Hartley Marine Corp., The Ohio River Company and Crounse Corporation. Petitioners are engaged in the business of transporting products in interstate and intrastate commerce by vessels on the Ohio and Mississippi Rivers. The Ohio River lies partly within West Virginia and partly within Ohio between milemarkers 40 and 317.



Petitioners engaged in "one point," "two point" and "pass-through" traffic on the Ohio River where it borders West Virginia. One point traffic occurs when either the origin or the destination of a river transport occurs within West Virginia. Two point traffic occurs where the origin and destination of a river transport both occur in West Virginia. Pass-through traffic occurs when neither the origin nor destination of a river transport occurs in West Virginia.

The sole means of propulsion for Petitioners' vessels is diesel fuel. The amount of such fuel used and consumed by Petitioners' vessels to transport products on the Ohio River increases as the size and weight of the vessel increase.

b. The West Virginia fuel use tax

West Virginia imposes an excise tax on the:

> use or consumption in this state of gasoline or special fuel purchased outside this state at the rate of five percent of the average wholesale price of such gasoline or special fuel . . . .

W. Va. Code § 11-15A-13(a)(2) (1996).[2]

Special fuel is defined to include diesel fuel. W. Va. Code § 11-15-18(c)(4), (9) (1996). This tax became effective on April 1, 1983. W. Va. Code § 11-15A-13(i) (1996). Every motor carrier[3] operating in West Virginia is required to pay the excise tax on all gasoline or special fuel consumed within the state. W. Va. Code § 11-15A-13(d) (1996).

The amounts collected from the fuel use tax are deposited in the West Virginia "road fund" and:

> shall be used only for the purpose of construction, reconstruction, maintenance and repair of highways, and payment of principal and interest on state bonds issued for highway purposes.

W. Va. Code § 11-15A-13(g) (1996).

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[2] The portions of the statutes in the West Virginia Code in effect for the years at issue (1983-91) are the same as the current statutes referred to herein.

[3] A motor carrier is defined as:

> (A) Any passenger vehicle which has seats for more than nine passengers in addition to the driver, any road tractor, tractor truck or any truck having more than two axles, which is operated or caused to be operated, by any person on any highway in this state using gasoline or special fuel; and (B) any aircraft, barge or other watercraft, or locomotive transporting passengers or freight in or through this state.

W. Va. Code § 11-15-18(c)(6) (1996).

c. Petitioners' payment of West Virginia taxes

Petitioners filed West Virginia fuel use tax returns with respect to all fuel consumed during the period for which refunds are claimed, except for a short period in 1986 during which the tax was determined to be invalid.[4] Along with each of the returns, Petitioners filed separate letters of protest indicating objections to the fuel use tax.

During the periods at issue, Petitioners also paid West Virginia tax on their business activities in the state, including business and occupation, carrier income, corporate net income, corporate license, business franchise, consumer sales and service and ad valorem property taxes. All returns were filed and all taxes were paid.

d. Federal Government's activities concerning inland navigable waterways

The United States Government has paramount responsibility for the regulation, servicing and maintenance of the inland navigable waterways system of which the Ohio River is a part. The United States Coast Guard documents vessels owned by Petitioners and used in their transportation businesses.

The United States Army Corps of Engineers is responsible for the planning, engineering, construction and operation of all of the locks and dams on the Ohio River System. Indeed, the Corps of Engineers even has an Ohio River Division.

Petitioners' employees are covered by the Federal Jones Act [Injuries to Seamen], 46 U.S.C. § 688, and the Federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* The United States Coast Guard has

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[4] This 1986 period (from April 1, 1986 through September 30, 1986) is the basis for the tax assessment against Hartley Marine Corp. That basis for invalidity (the failure to provide a credit) was allegedly cured in W. Va. Senate Bill 1, enacted July 23, 1986.

jurisdiction over seamen who are working on vessels on the inland river system.

The Federal Government imposes, and Petitioners have paid and are paying, a Federal fuel use tax on the fuel consumed by Petitioners' vessels. This tax is used to construct improvements on the Ohio River and other navigable waterways of the inland river system. West Virginia did not permit Petitioners a credit for the Federal fuel use tax paid.

2. The Assessment And Claims For Refund

Petitioners timely filed claims for refund with respect to the West Virginia fuel use tax they paid asserting the invalidity of the tax. The Department of Tax and Revenue ("Department"), with one exception, issued letters denying such claims.[5] Petitioners thereafter timely filed petitions for refund with the Tax Commissioner of West Virginia ("Tax Commissioner"). Amendments to the petitions were timely filed by The Ohio River Company.

As the result of an audit of Hartley Marine Corp. ("Hartley"), the Department proposed fuel use tax deficiencies for the short period in 1986. Hartley timely protested the proposed assessment by filing a petition for reassessment with the Tax Commissioner asserting the invalidity of the tax.

3. The Proceedings Below

How the federal questions were raised and passed on below. In Petitioners' petitions for refund before the Tax Commissioner, including amendments thereto, and in Hartley's petition for reassessment before the Tax Commissioner, in their briefs before the Circuit Court of Kanawha County, West Virginia, and in their briefs before the Supreme Court of Appeals of West Virginia, Petitioners contended that the West Virginia fuel use tax was invalid under the Northwest

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[5] The one exception is the refund claim filed by Crounse Corporation for the period July 1, 1988 through June 30, 1990. Crounse Corporation received no answer from the Department on this claim. App. H at 110a.

Ordinance of 1787 and the Virginia Compact of 1789, and under the Duty of Tonnage, Supremacy and Commerce Clauses of the United States Constitution. The Tax Commissioner and the courts explicitly noted and ruled on these objections. App. A at 4a & 26a, 4a & 25a, 4a & 13a-14a, and 4a & 22a-23a; App. B at 28a-29a; App. D at 35a; App. E at 73a-74a, 71a & 73a, 58a-59a & 61a, and 61a-62a & 71a; App. F at 85a & 89a-90a, 84a & 88a, 85a & 90a, and 84a-85a & 87a-88a; App. G at 100a & 105a, 99a & 102a, 100a & 106a, and 98a-100a & 104a; App. H at 115a & 123a-124a, 115a & 122a-123a, 114a & 117a-118a, and 115a & 121a-122a.

The decisions below. Relying on a decision of the Supreme Court of Appeals of West Virginia which held that the Northwest Ordinance and Virginia Compact were purportedly superseded upon West Virginia's entry into statehood, and further relying upon a decision of the Circuit Court of Kanawha County, West Virginia, the Tax Commissioner determined that the West Virginia fuel use tax did not violate either the Northwest Ordinance or the Virginia Compact. App. E at 73a-74a; App. F at 89a-90a; App. G at 105a; and App. H at 123a-124a. The Tax Commissioner rejected Petitioners' Duty of Tonnage challenge to the tax on the theory that the levy was imposed upon types of fuel other than that consumed by Petitioners and because entities other than operators of vessels were also subject to the tax. App. E at 73a; App. F at 88a; App. G at 102a; and App. H at 123a. The Tax Commissioner did not, however, state why the fact that the imposition might be a valid levy on others validated the imposition of the charge on Petitioners.

The Tax Commissioner determined that the fuel use tax was not preempted by Federal law. According to the Tax Commissioner, the Federal Government's numerous statutes and regulations concerning the navigable waterways, including the imposition of a tax on fuel consumed by vessels in commercial waterway transportation, did not demonstrate to him that West Virginia was preempted from imposing its tax. App. E at 60a-61a; App. F at 90a; App. G at 106a; and App. H at 117a-118a.

Although acknowledging that *Helson v. Kentucky*, 279 U.S. 245 (1929), which held that the imposition of a fuel use tax on the portion of fuel consumed in Kentucky by an interstate ferry violated the Commerce Clause, had been reaffirmed by *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973), the Tax Commissioner concluded that he believed the continued validity of *Helson* was questionable in light of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). App. E at 62a-64a. The Tax Commissioner also found that the fuel use tax did not violate the fourth prong of *Complete Auto*, which looks at whether the tax is fairly related to the services provided by the state. In making this determination, the Tax Commissioner treated the fuel use tax as a general revenue tax, rather than a user fee or tax, despite the fact that 100% of the amounts collected by West Virginia are dedicated to the state's "road fund" and may be used only for highway purposes. App. E at 66a-71a; App. F at 87a-88a; App. G at 101a-102a; and App. H at 121a-122a.

The Circuit Court of Kanawha County, West Virginia summarily held that Petitioners' assertions were without merit and adopted the findings of fact and conclusions of law of the Tax Commissioner. App. B at 29a and App. D at 35a.

The Supreme Court of Appeals of West Virginia affirmed the Circuit Court's decisions. It held that West Virginia's entry into statehood "necessarily" resulted in the Northwest Ordinance and the Virginia Compact being superseded by the United States Constitution. App. A at 25a-26a.

The court also held that the fuel use tax did not constitute a

> prohibited toll on the use of this state's navigable waterways, but an excise tax on the use of fuel which is imposed on *all* motor carriers operating within this state, including[] buses, trucks, trains, and aircraft.

App. A at 25a (citation omitted). Without any explanation as to why the imposition of this levy on carriers other than vessels was relevant, the court stated that "[i]f this use tax were

solely imposed for fuel consumption on the waters of this state, Appellants' arguments would be more convincing." App. A at 25a.

The court rejected Petitioners' preemption arguments. Referring to the portion of its opinion concerning the Duty of Tonnage Clause, the court stated in a footnote that:

> [b]ecause we reject Appellants' attempt to analogize the use tax to a toll which is prohibited pursuant to 33 U.S.C. § 5, we do not discuss this statute at length within the preemption section of this opinion.

App. A at 11a n.11.

The court also stated that:

> [s]ince we determine that Appellants have failed to demonstrate the existence of such a conflict [between the West Virginia tax and a Federal statute], we are without authority to imply that Congress intended to "occupy the field" of inland waterways.

App. A at 13a-14a (citation omitted).

Finally, the court found that the West Virginia tax did not violate the Commerce Clause. Although the tax is dedicated exclusively to the state's "road fund," the court found that the West Virginia tax was fairly related to the services provided by the state under this Court's analysis for general revenue taxes. App. A at 19a-23a. The court, however, declined to characterize the tax as either a general revenue tax or as a user fee or tax (App. A at 17a n.13), despite this Court's decisions demonstrating that a different analysis applies depending upon the type of exaction being imposed. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355 (1994).

REASONS FOR GRANTING THE PETITION

The significance of this case cannot be overstated. Every year hundreds of millions of tons of waterborne commerce

move on the U.S. inland waterway system, of which the Ohio River is a part. If West Virginia is permitted to impose a tax on the fuel consumed by vessels that navigate the Ohio River, including vessels that make no stops in West Virginia, and to dedicate this tax to its highways, it is anticipated that many, if not all, states and municipalities that border interstate navigable waterways (the inland waterways as well as the coastal waterways) will enact laws imposing similar taxes. These taxes, which would directly contravene over 200 years of jurisprudence providing that interstate commerce along the nation's navigable waterways shall be free, will burden all vessels and all customers who ship products.

The West Virginia fuel use tax violates the Northwest Ordinance and the Virginia Compact. It violates the Duty of Tonnage, Commerce and Supremacy Clauses of the United States Constitution. It is preempted by Federal statutes. Thus, numerous independent reasons exist for finding the West Virginia tax invalid. Such a holding would prevent other states and municipalities from attempting to impose similar unconstitutional taxes that improperly burden waterborne commerce.

THE DECISION BELOW IS INCOMPATIBLE WITH PRIOR DECISIONS OF THIS COURT AND DECISIONS OF THE HIGHEST COURTS OF OTHER STATES AND, IF LEFT UNDISTURBED, WILL UNDERMINE ESSENTIAL CONSTITUTIONAL RESTRAINTS ON STATE TAXATION

The Northwest Ordinance of 1787 and the Virginia Compact of 1789

Congress passed the Northwest Ordinance in 1787. Article IV provides that:

> *[T]he navigable waters leading into the Mississippi* and Saint Lawrence, and the carrying places between the same, *shall be* common highways, and *forever free*, as well to the inhabitants of the said

> territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, *without any tax, impost, or duty therefor*.

U.S.C.A. Const. Art. 1 The Organic Laws of the United States at p.22 (emphasis added). It should be noted that the Ohio River is a navigable waterway that leads into the Mississippi River.

Almost immediately after the Federal Constitution was ratified, Congress reenacted the Northwest Ordinance, in all parts relevant here, on August 7, 1789. *Economy Light & Power Co. v. United States*, 256 U.S. 113, 119 (1921) ("The first Congress under the new Constitution expressed a desire to have [the Northwest Ordinance] continue in full effect, in the Act of August 7, 1789 (Chapter 8, 1 Stat. 50).").

The Virginia Compact was enacted by the General Assembly of Virginia on December 18, 1789. Section 11 of the Compact provides:

> [T]hat *the use and navigation of the river Ohio*, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth lies thereon, *shall be free* and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed state on the river as aforesaid shall be concurrent only with the states which may possess the opposite shores of the said river.

13 Henning's Stat. at L., c.14 § 11 (emphasis added).

The Virginia Compact, by the sanction of Congress, became a law of the Union. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 566 (1851).

Relying on one of its own decisions, the Supreme Court of Appeals of West Virginia concluded that West Virginia's entry into statehood "necessarily" resulted in each of these Compacts being superseded by the United States Constitution.

App. A at 25a-26a (citing *American Barge Line Co. v. Koontz*, 136 W. Va. 747, 757-58, 68 S.E. 56, 61-62 (1951), *overruled on other grounds by Western Maryland Railway Co. v. Goodwin*, 167 W. Va. 804, 282 S.E.2d 240 (1981), *appeal dismissed*, 456 U.S. 952 (1982)). This conclusion, however, ignores decisions of this Court and of the highest courts of two states which provide that the Northwest Ordinance and the Virginia Compact are valid Federal laws.

In *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921), this Court discussed the provisions of the Northwest Ordinance and stated:

> To the extent that it pertained to *internal affairs*, the Ordinance of 1787 -- notwithstanding its contractual form -- was no more than a regulation of territory belonging to the United States, and was superseded by the admission of the state of Illinois into the Union "on an equal footing with the original states in all respects whatever." . . . *But, so far as it established public rights of highway in navigable waters capable of bearing commerce from state to state, it did not regulate internal affairs alone, and was no more capable of repeal by one of the states than any other regulation of interstate commerce enacted by the Congress;* being analogous in this respect to legislation enacted under the exclusive power of Congress to regulate commerce with the Indian tribes.

256 U.S. at 120-21 (emphasis added) (citations omitted).

Thus, under *Economy Light*, although the act of Congress in admitting a state is sufficient to supersede provisions of the Northwest Ordinance pertaining to the state's *internal affairs*, where interstate commerce is involved, the Northwest Ordinance remains in full force to preempt certain improper state actions, such as taxation of navigation on interstate waterways.

That the Virginia Compact is valid and binding upon the states is confirmed by this Court's decision in *Wedding v. Meyler*, 192 U.S. 573 (1904). The issue in that case was whether an Indiana judgment was entitled to full faith and credit, and the answer was dependent upon whether service of a summons was valid when it was made on a steamboat in the Ohio River. This Court, through Justice Holmes, held that Indiana had jurisdiction to serve process below the low-water mark on the Ohio River (*i.e.*, within the boundaries of Kentucky) because the Virginia Compact provides both states with concurrent jurisdiction and that, therefore, the Indiana judgment was entitled to full faith and credit. Had this concurrent jurisdiction derived from the Virginia Compact not been present, service of the summons would not have been valid.

In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518 (1851), a suit was brought against a bridge construction company concerning the construction of a bridge in what was then western Virginia (now West Virginia) across the Ohio River. The company defended the construction of the bridge by asserting that it had received authorization for the construction by Virginia and that there was no Act of Congress prohibiting obstructions on the Ohio River. This Court rejected that argument and subsequently described its holding as follows:

> This Court rejected that argument in light of a clause in the Virginia-Kentucky Compact of 1789, sanctioned by Congress, declaring that the use and navigation of the Ohio River shall be "free and common to the citizens of the United States." . . . *Even though there had been no Act of Congress explicitly regulating navigation on the river, the Court stated that the prohibition in the Compact was controlling because "[t]his compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action?*"

Cuyler v. Adams, 449 U.S. 433, 439 n.7 (1981) (emphasis added) (citations omitted).

Thus, in both *Wedding v. Meyler* and *Pennsylvania v. Wheeling & Belmont Bridge Co.*, this Court relied upon provisions in the Virginia Compact for its holdings. Similarly, decisions of the highest courts of two states have relied upon the Virginia Compact. *Benham v. Indiana*, 637 N.E.2d 133 (Ind. 1994) (Indiana is authorized by the Virginia Compact and the Indiana Constitution to exercise concurrent jurisdiction with the State of Kentucky over the Ohio River, including that portion beyond Indiana's territorial boundaries); *Allphin v. Ohio River Co.*, 306 S.W.2d 94 (Ky. 1957) (holding that a tax imposed by reason of the operation of a barge line on the Ohio River was invalid based upon the Virginia Compact and the Kentucky Constitution).

As the foregoing demonstrates, the provisions contained in the Northwest Ordinance and the Virginia Compact declaring the status of navigable waterways such as the Ohio River as common highways, forever free, remain valid and effective today. The effect of the West Virginia fuel use tax on Petitioners' operations is to impose a toll or charge for the navigation of the free highways of commerce maintained by the Federal Government. The tax is not a charge for any service provided by West Virginia and cannot be justified under such a rationale. For that reason alone, it is respectfully submitted that certiorari should be granted and the judgment below should be reversed.

The Duty of Tonnage Clause

The decision below renders the Duty of Tonnage Clause (art. I, § 10, cl. 3) of the U.S. Constitution a practical nullity. If left undisturbed, it will open the floodgates for other states and municipalities that border a navigable waterway to circumvent this bedrock principle of our Federal system that such waterways should be free.

The Duty of Tonnage Clause prohibits a state, without the consent of Congress, from imposing a charge or duty for the privilege of entering, trading in, or lying in a port, harbor or waterway.

Not all charges on vessels are prohibited by the Duty of Tonnage Clause. The prohibition against duties of tonnage does not extend to charges made by a state as a reasonable compensation for services rendered to and enjoyed by a vessel. Thus, a state is not prohibited from imposing a reasonable charge for services such as pilotage and wharfage, charges for loading or unloading cargoes, and charges for similar services provided by a state to a vessel. *See, e.g., Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265-66 (1935); *Huse v. Glover*, 119 U.S. 543 (1886).

When, however, a state attempts to impose on a vessel a charge that is not related to any service provided by the state to the vessel but is, instead, levied upon the vessel based upon its weight or a proxy for its weight (such as fuel consumption), such a charge, without the consent of Congress, violates the Duty of Tonnage Clause and is void. *See, e.g., Inman S.S. Co. v. Tinker*, 94 U.S. 238 (1876); *Cannon v. New Orleans*, 87 U.S. 577 (1874); *State Tonnage Tax Cases*, 79 U.S. 204 (1870); *Indiana Port Comm'n v. Bethlehem Steel Corp.*, 653 F. Supp. 604 (N.D. Ind.), *aff'd on other grounds*, 835 F.2d 1207 (7th Cir. 1987). This prohibition applies to vessels engaged in intrastate commerce as well as vessels engaged in interstate commerce. *State Tonnage Tax Cases*, 79 U.S. at 219.

That a tax is not directly measured by the tonnage of a vessel or that it is denominated otherwise is irrelevant in determining whether the imposition violates the Duty of Tonnage Clause. As this Court has stated:

> Hence the prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port.

Clyde Mallory Lines, 296 U.S. at 265-66 (citations omitted); *accord State Tonnage Tax Cases*, 79 U.S. at 214 ("if the States, without the consent of Congress, tax ships or vessels

as instruments of commerce, by a tonnage duty, or indirectly by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess, as every such act falls directly within the prohibition of the Constitution").

The amount of fuel used and consumed by Petitioners' vessels to transport products on the Ohio River increases as the size and weight of the vessel increase. The West Virginia fuel use tax therefore imposes a charge for the use of the Ohio River as it borders West Virginia. Congress has not consented to this charge. Vessels have no choice but to pay the tax or discontinue their use of the Ohio River.

The West Virginia tax bears no relationship to any service provided to the vessels by West Virginia. Indeed, none of the tax is used to provide any service to the vessels, since the tax is dedicated exclusively to the West Virginia highways. By burdening a necessity of the voyage (*i.e.*, fuel consumption), West Virginia has erected an economic barrier to the movement of cargo on the navigable waters of the Ohio River.

If the prohibition in the Duty of Tonnage Clause could be avoided by simply shifting the tax from the vessel itself (*i.e.*, measured by actual tonnage) to the fuel used to propel the vessel, which propulsion is required in the process of river navigation, then the Duty of Tonnage Clause would be a practical nullity. It should be noted that a tax imposed on the fuel consumed by a vessel while plying a state's navigable waterways is the antithesis of a use tax imposed on a vessel itself. A use tax imposed on a vessel is imposed only one time, when the vessel is first used in the state, and therefore is not an impermissible levy on the navigation or operation of vessels on navigable rivers. Contrariwise, the West Virginia fuel use tax is imposed on the fuel consumed by a vessel every time it enters into the state's navigable waterways.

That the tax in issue herein is imposed on all motor carriers, "including[] buses, trucks, trains, and aircraft" (App. A at 25a) is irrelevant in determining whether the imposition of the tax on vessels for plying West Virginia's navigable waterways violates the Duty of Tonnage Clause. Were a state

permitted to circumvent the Duty of Tonnage Clause by merely imposing the tax on other entities which are not protected by the Duty of Tonnage Clause, the Clause would be rendered ineffectual. *See Exxon Corp. v. Hunt*, 475 U.S. 355, 376 (1986) ("We decline the dissent's invitation to hold that the Spill Act is valid in its entirety because a substantial portion of its purposes are permissible. Such a holding would be an open invitation to the States to flout federal law by including valid provisions within clearly invalid statutes").

That the West Virginia tax is imposed on the consumption of fuel while plying the waterways, rather than for access to ports, is insignificant. There is no practical difference between restricting access to ports and access to navigable waters. If the states could avoid the constitutional prohibition against charging for access to a port or harbor by charging for traversing or transiting the navigable waters leading to such port or harbor, the national policy aimed at protecting free access to facilities such as navigable rivers and ports along such rivers that make commerce among the states possible would be frustrated and ineffective.

The Supremacy Clause

The Supremacy Clause of the United States Constitution provides: "This Constitution and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. Const., art. VI, cl. 2.

Nearly 100 years after the Northwest Ordinance, the Virginia Compact and the Duty of Tonnage Clause established that the Ohio River and other waterways were to be free, Congress expressly reaffirmed the Free Rivers Doctrine by its enactment of the Rivers and Harbors Appropriation Act of 1884 (Act July 5, 1884, c. 229, § 4, 23 Stat. 147). This Federal law has been codified in the United States Code and, as relevant here, provides:

> *No tolls or operating charges whatever shall be levied upon* or collected from *any vessel*, dredge, or

> other water craft *for passing through any* lock, canal, *canalized river*, or other work for the use and benefit of navigation, now belonging to the United States or that may be hereafter acquired or constructed; . . . .

33 U.S.C. § 5 (emphasis added).

When a statute of the United States unambiguously prohibits certain types of legislation, the states are expressly preempted from enacting such legislation. U.S. Const., art. VI, cl. 2; *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 12 (1983); *see Exxon Corp. v. Hunt*, 475 U.S. 355, 362 (1986) ("When a federal statute unambiguously precludes certain types of state legislation, we need go no further than the statutory language to determine whether the state statute is pre-empted.") (citation omitted).

In *Aloha Airlines*, Hawaii's tax on the gross income of airlines was struck down as violating 49 U.S.C. § 1513(a), which prohibited a state from imposing a tax on, *inter alia*, an airline's gross receipts. That the Hawaiian tax professed to be a property tax measured by gross receipts, rather than a straightforward gross receipts tax, was irrelevant for preemption purposes. As this Court stated:

> The manner in which the state legislature has described and categorized [the Hawaiian tax statute] cannot mask the fact that the purpose and effect of the provision is to impose a levy upon the gross receipts of airlines.

464 U.S. at 13-14 (footnote omitted). The state tax was therefore preempted.

Likewise, the West Virginia fuel use tax is preempted by 33 U.S.C. § 5. That Federal law expressly forbids the imposition of "tolls or operating charges whatever" on vessels for passing through any canalized river for the use or benefit of navigation. The unambiguous language of the Federal legislation leaves no room for doubt that the prohibition applies to states as well as to private parties. *Indiana Port Comm'n v.*

Bethlehem Steel Corp., 835 F.2d 1207, 1210 (7th Cir. 1987) (state port authority prohibited by 33 U.S.C. § 5 from imposing a general fee for use of a port and public terminal acquired by the United States).

Even if the plain language of 33 U.S.C. § 5 did not contain an express prohibition of the imposition of a toll or operating charge "whatever," which it does, the statute's legislative history provides that the purpose of the prohibition was to ensure free navigation. *Indiana Port Comm'n*, 835 F.2d at 1210 ("The limited legislative history suggests one purpose of this provision is to maintain free navigation for public use of the federal waterways. H.R. Rep. No. 1554, 48th Cong., 1st Sess. 6 (1884)").

Therefore, since 1884 (when the predecessor of 33 U.S.C. § 5 was first enacted by Congress), a Federal law has expressly prohibited states from levying or collecting any toll or operating charge on a vessel for passing through any canalized river. The Ohio River is a canalized river "for the use and benefit of navigation" by virtue of the locks and dams constructed thereon and maintained by the United States Government. *See United States v. Cress*, 243 U.S. 316, 326 (1917) (the Federal Government "canalized" the Cumberland and Kentucky Rivers by construction of dams and locks).

Despite the conclusion of the decision below to the contrary (App. A at 11a n.11), the West Virginia tax constitutes an operating charge for the use of the Ohio River and therefore is expressly preempted by 33 U.S.C. § 5. Petitioners' vessels are propelled along the Ohio River by the burning of fuel. There is no other commercially feasible means of operating Petitioners' vessels. Inasmuch as the West Virginia tax is imposed on the consumption of a vessel's fuel, and fuel consumption is a necessary prerequisite for the vessel's navigation of the Ohio River, the tax constitutes an impermissible charge for the operation of vessels for passing through the Ohio River.

The denomination of the West Virginia tax as a use tax on fuel, rather than an operating charge, simply cannot mask the

fact that the effect of the provision is to impose a prohibited operating charge on vessels for passing through the Ohio River.

In addition to the explicit Federal prohibition against a tax such as the West Virginia fuel use tax, the Federal law in this area is so pervasive that it must be concluded that the Federal Government has determined to "occupy the field" of navigable inland waterways and that therefore no state may impose a tax on the use of the navigable waterways. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148 (1980) ("There is no room for these taxes [Arizona fuel use tax and motor carrier license tax] in the comprehensive federal regulatory scheme."). The Federal Government's intent to "occupy the field" is found in Congress' imposition of tax on fuel consumed on the inland waterways, the use of the amounts collected from that tax for the construction and rehabilitation of the Ohio River and other waterways, the United States Coast Guard's jurisdiction over these waterways, and the exclusive applicability of the Jones Act [Injuries to Seamen] to employees working on vessels navigating these waterways, as well as the numerous other provisions regulating and maintaining the navigable interstate waterways.

The Inland Waterways Revenue Act of 1978 included 26 U.S.C. § 4042, which imposes a tax on the fuel used and consumed by vessels in commercial waterway transportation. The amounts collected pursuant to this provision are transferred to the Inland Waterways Trust Fund to be used for construction and rehabilitation of intracoastal and inland waterways including the Ohio River. 33 U.S.C. §§ 1801 through 1804 (§§ 1801-1802 currently at 26 U.S.C. § 9506). The interjection of the West Virginia tax into this Federal scheme presents an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

The numerous other laws enacted by Congress with respect to the regulation and maintenance of the navigable interstate waterways further demonstrate the Federal Government's intent to occupy the field of commerce and navigation on the

interstate waterways. For example, an entire title of the United States Code, Title 33, is devoted to navigation and the navigable waters, and contains a plethora of statutes concerning the interstate navigable waterways. Similarly, many of the statutes found in Title 46 (entitled "Shipping") concern such waterways. This clearly indicates that Congress intended to "occupy the field" of navigable inland waterways and not leave to the states the authority to impose a tax that so directly conflicts with the national objective.

The Commerce Clause

That West Virginia's imposition of a tax on fuel consumed by vessels plying the Ohio River and other interstate navigable waterways violates the Commerce Clause has been established for decades. In *Helson v. Kentucky*, 279 U.S. 245 (1929), a case on "all fours" with the instant case, Kentucky attempted to impose an excise tax on the fuel consumed in the state by an interstate ferry traveling along the Ohio River between Illinois and Kentucky. The fuel use tax was invalidated as "[t]he tax is exacted as the price of the privilege of using an instrumentality of interstate commerce." 279 U.S. at 252. That the tax was imposed upon the use of the fuel did not alter this conclusion:

> And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce.

279 U.S. at 252.

The principles of *Helson* were reaffirmed in *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973). The issue in *United Air Lines* was whether Illinois' imposition of a use tax on fuel stored in Illinois and loaded aboard aircraft for in-flight consumption violated the Commerce Clause.

This Court, while upholding the tax, stated that "fuel cannot be taxed . . . by the State in which it is merely consumed, under *Helson*." 410 U.S. at 630. As this Court provided:

> The line drawn between an impermissible tax on mere consumption of fuel, as in *Helson*, and a permissible tax on storage of fuel before loading . . . continues to serve rational purposes.

410 U.S. at 629 (citations omitted).

Thus, "[u]nder *Helson*, States over which the planes fly will be unable to impose a tax on mere consumption." 410 U.S. at 631 (footnote omitted).

The West Virginia fuel use tax is applicable to all traffic on the Ohio River and other interstate navigable waterways, even though the traffic may be totally interstate in character. It is a prohibited tax on the "mere consumption" of fuel in interstate commerce and therefore is an undue burden on interstate commerce in violation of the Commerce Clause.

In addition to violating the Commerce Clause principles articulated by this Court in *Helson* over half a century ago, the West Virginia tax also violates the Commerce Clause test articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), for determining the validity of a tax. The fourth prong of this test provides that a tax violates the Commerce Clause if it is not fairly related to the services provided by the state. *Complete Auto*, 430 U.S. at 279.

The analysis applied in determining whether such a violation occurs depends upon whether the exaction is a general revenue tax or is a user fee or tax. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-22 (1981). Despite noting this Court's distinction in *Commonwealth Edison* between user fees and general revenue taxes, the Supreme Court of Appeals of West Virginia erroneously failed to follow this principle and declined to characterize the West Virginia tax as either a user fee or a general revenue tax. The court, relying on a footnote in one of its other decisions, stated that the "form of tax is inconsequential to questions of nexus and state

benefits . . . ." App. A at 17a n.13 (citing *Western Maryland Railway Co. v. Goodwin*, 167 W. Va. 804, 826 n.3, 282 S.E.2d 240, 253 n.3 (1981), *appeal dismissed*, 456 U.S. 952 (1982)). The court then analyzed the West Virginia fuel use tax under the principles stated in *Commonwealth Edison* for general revenue taxes.

The West Virginia tax is not a general revenue tax. The amounts collected do not go into the state's treasury for the general support of government. The funds are dedicated exclusively to the West Virginia "road fund" and may be used only for highway purposes. W. Va. Code § 11-15A-13(g) (1996). The fuel use tax is entirely different from the severance tax considered in *Commonwealth Edison*, where a portion of the tax was immediately used for the general support of government and the remainder was put into a trust fund for the general support of government in the future. *Commonwealth Edison*, 453 U.S. at 621, 622 n.11; *see also Reidy Terminal, Inc. v. Director of Rev.*, 898 S.W.2d 540 (Mo. 1995) (Missouri statute imposing a charge for receiving petroleum products in Missouri constituted an invalid fee, under the Commerce Clause principles articulated in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), and *Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355 (1994), because the funds received were dedicated to an underground storage tank insurance fund and the corporation was ineligible to receive benefits from the fund).

Inasmuch as the funds received from the West Virginia tax are dedicated exclusively to the state's highways, the exaction is a specific charge for the use of state-owned or state-provided facilities (*i.e.*, the West Virginia highways) and thus constitutes a user fee or tax. *See Commonwealth Edison*, 453 U.S. at 621-22. A levy that constitutes a user fee or tax satisfies the Commerce Clause only if it:

> (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the

> benefits conferred, and (3) does not discriminate against interstate commerce.

Northwest Airlines, 510 U.S. at 369 (citing *Evansville-Vanderburgh Airport*, 405 U.S. at 716-17).

The West Virginia tax is not based on a fair approximation of Petitioners' use of the West Virginia highways. Petitioners' vessels do not use the West Virginia highways. Petitioners' vessels utilize the navigable waterways, the regulation, servicing and maintenance of which are within the jurisdiction of the Federal Government. Thus, the West Virginia fuel use tax is invalid.

That Petitioners might receive some incidental benefit from the West Virginia highways on which goods and employees may be transported to and from Petitioners' vessels does not validate the tax. Trucks transporting goods that use the West Virginia highways pay the West Virginia fuel use tax for the fuel consumed in their vehicles.

The West Virginia fuel use tax thus violates the Commerce Clause under the principles articulated (A) over 50 years ago in *Helson v. Kentucky*, and reaffirmed in *United Air Lines*, and (B) in *Complete Auto*, *Commonwealth Edison*, and *Northwest Airlines*. Moreover, as this Court noted in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), an area of special Federal concern requires higher scrutiny under the Commerce Clause to make sure that state conduct does not interfere with national policy. Free access to the rivers has been a bedrock principle of this Government since the founding of the Republic. West Virginia's tax thus triggers a higher level of scrutiny because of the principles that it jeopardizes.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

FILED

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ANCIL G. RAMEY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1996 Term

No. 23052

HARTLEY MARINE CORPORATION,
A DELAWARE CORPORATION,
Petitioner Below, Appellant,

v.

ALAN L. MIERKE, STATE TAX COMMISSIONER
OF WEST VIRGINIA,
Respondent Below, Appellee

HARTLEY MARINE CORPORATION,
A DELAWARE CORPORATION,
Petitioner Below, Appellant,

v.

ALAN L. MIERKE, STATE TAX COMMISSIONER
OF WEST VIRGINIA,
Respondent Below, Appellee

THE OHIO RIVER COMPANY,
A WEST VIRGINIA CORPORATION,
Petitioner Below, Appellant,

v.

JAMES H. PAIGE III, STATE TAX COMMISSIONER
OF WEST VIRGINIA
Respondent Below, Appellee

CROUNSE CORPORATION,
A KENTUCKY CORPORATION,
Petitioner Below, Appellant

v.

JAMES H. PAIGE III, STATE TAX COMMISSIONER
OF WEST VIRGINIA,
Respondent Below, Appellee

Appeals from the Circuit Court of Kanawha County
Honorable Robert K. Smith, Circuit Judge
Civil Action Nos. 90-AA-171, 92-AA-64, 92-AA-91,
93-AA-50

AFFIRMED

Submitted: January 16, 1996
Filed: July 12, 1996

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JUSTICE WORKMAN delivered the Opinion of the Court.

SYLLABUS

The fuel use tax that is imposed pursuant to West Virginia Code § 11-15A-13 (1995), as it relates to fuel consumed on the inland waterways, does not violate the federal constitution or any other law.

Workman, Justice:

Hartley Marine Corp. ("Hartley Marine"), The Ohio River Company ("ORCO"), and Crounse Corporation ("Crounse") appeal[1] from an order entered by the Circuit Court of Kanawha County on February 8, 1995, affirming the administrative decisions of the State Tax Commissioner which denied Appellants' petitions seeking refunds of West Virginia fuel use tax payments and affirmed an assessment of additional fuel use tax against Hartley Marine. Appellants contend that imposition of the fuel use tax against them violates the Supremacy, Commerce, Due Process, Equal Protection, and Duty of Tonnage Clauses of the United States Constitution, and is further prohibited by the Northwest Ordinance of 1787 and the Virginia Compact of 1789. Upon review of these claims, we find no impediment, constitutional or otherwise, to the imposition of the fuel use tax against Appellants. Accordingly, we affirm the decision of the lower court.

West Virginia Code § 11-15A-13(a)(2) (1995) imposes an excise tax[2] on the "use or consumption in this state of gasoline or special fuel purchased outside this state at the rate of five percent of the average wholesale price of such gasoline or special fuel. . . ." A minimum wholesale price for purposes of computing the tax is fixed by statute at ninety-seven cents per gallon. W. Va. Code § 11-15A-13(a)(1). Every motor carrier operating in West Virginia is required to pay the excise tax on all gasoline or special fuel used within the state. W. Va. Code § 11-15A-13(d).

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[1] These cases were before the circuit court as separate appeals from administrative decisions issued by the State Tax Commissioner. Since all three cases involve common questions of law and fact, the circuit court granted a joint motion for consolidation.

[2] This tax became effective April 1, 1983. Beginning in 1986, the state allowed a credit against the fuel use tax for any "sales tax or compensating use tax" paid on fuel purchased outside the state. W. Va. Code § 11-15A-10a (1995). Appellants have never utilized this credit, however, since they have not paid any sales taxes to other states for fuel consumed in West Virginia.

Appellants are motor carriers as defined by West Virginia Code § 11-15-18(c)(6) (1995)[3] who are engaged in the business of transporting products by watercraft in interstate commerce on the Ohio and Mississippi River systems.

Appellants' watercraft[4] operate within this state while traveling on the Ohio River.[5] The sole means of propulsion for Appellants' watercraft is either gasoline or special fuel.[6]

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[3] A motor carrier is defined as:

> (A) Any passenger vehicle which has seats for more than nine passengers in addition to the driver, any road tractor, tractor truck or any truck having more than two axles, which is operated or caused to be operated, by any person on any highway in this state using gasoline or special fuel; (B) any aircraft, barge or other watercraft, or locomotive transporting passengers or freight in or through this state.

W. Va. Code § 11-15-18(c)(6).

[4] The watercraft at issue are line-haul towboats.

[5] When traveling between river mile markers 40 and 317 while in waters lying east of the low water mark on the west bank of the Ohio River as it existed in 1787, Appellants are operating their respective watercraft in West Virginia. Conversely, they are operating in Ohio when their watercraft travel between mile markers 40 and 317 in waters lying west of the low water mark of 1787.

Because Appellants cannot determine precisely when their watercraft are within this state due to improvements and changes along the Ohio River which have occurred since 1787, Appellants and the Department of Tax and Revenue had previously agreed to a 15% deduction or allowance in the amount of special fuel use tax owed to compensate for this uncertainty. Appellants relied on this allowance when filing their West Virginia gasoline and special fuel use tax returns.

[6] "Special fuel" is defined as:

> any gas or liquid, other than gasoline, used or suitable for use as fuel in an internal combustion engine. The term "special fuel" shall include products commonly known as natural or casinghead gasoline and shall include gasoline and special fuel for heating any private residential dwelling, building or other premises. . . .

(Footnote continued)

Appellants pay a federal use tax on the same fuel subject to the fuel tax imposed by the State of West Virginia.[7] *See* 26 U.S.C. § 4042 (1994). Appellants do not pay a state use tax based on fuel consumed in their towboats in any state other than West Virginia.

Appellants filed West Virginia fuel use tax returns with respect to all fuel consumed during the period for which they seek their respective refunds.[8] Along with each of the returns, Appellants filed separate letters of protest indicating objections to the fuel use tax.

During the periods for which Appellants seek refunds, they engaged in one point, two point and pass-through business in West Virginia. One point traffic occurs when the origin of a transport is in one state and the destination in another. Thus, one point traffic occurs whenever either the origin or the destination of transport is in West Virginia. Two-point traffic occurs where both the origin and destination of the transport are both in West Virginia. Pass-through traffic, as the name implies, involves neither an origination or destination within this state.

W. Va. Code § 11-15-18(c)(9).

[7] West Virginia does not permit Appellants to take a credit for the federal fuel use tax paid to the Internal Revenue Service for fuel consumed within this state.

[8] Through Civil Action No. 90-AA-171, Hartley Marine sought a refund for fuel use tax assessed in the amount of $8,608.94 covering the period of January 1, 1985, through December 31, 1987. In a separate civil action, No. 92-AA-64, Hartley Marine sought a refund in the total amount of $123,989.64 for the period April 1, 1983, through April 30, 1986, and July 1, 1986, through March 30, 1990. ORCO sought a refund of fuel use tax paid in the amount of $1,062,402.88 for the periods of April 1, 1983, through April 30, 1986, and July 1, 1986, through March 30, 1990. Crounse sought a refund in the aggregate amount of $325,662.43 for fuel tax paid during April 1, 1983, and December 31, 1991.

PREEMPTION

We turn first to the circuit court's determination that West Virginia Code § 11-15A-13 is not preempted by federal law. As this is a conclusion of law, our review is de novo. *See* Syl. Pt. 1, *Appalachian Power Co. v. State Tax Department,* 195 W.Va. 573, 466 S.E.2d 424 (1995) (holding that statute interpretation presents legal question subject to de novo review); *Kollar v. United Transp. Union,* 83 F.3d 124, 125 (5th Cir. 1996) (recognizing that "preemption is a question of law reviewed *de novo*").

The preemption doctrine has its origin in the Supremacy Clause of the United States Constitution, which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. As interpreted by Chief Justice Marshall, state laws are invalid under the Supremacy Clause if they "interfere with, or are contrary to the laws of congress, made in pursuance of the constitution." *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 604 (1991) (quoting *Gibbons v. Ogden,* 9 Wheat. 1, 211 (1824)). Despite the existence of this doctrine, however, preemption is disfavored in the absence of convincing evidence warranting its application: "As we have frequently indicated, '[p]re-emption of state law by federal statute or regulation is not favored "in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."'" *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 634 (1981) (quoting *Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 317 (1981), quoting *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142 (1963)).

Initially, we recognize "the presumption that Congress does not intend to preempt areas of traditional state regulation." *FMC Corp. v. Holliday,* 498 U.S. 52, 62 (1990). As explained in *WLR Foods, Inc. v. Tyson Foods, Inc.,* 65 F.3d 1172 (4th Cir. 1995), *cert. denied,* __ U.S. __, 116 S.Ct. 921 (1996), "[t]here is a strong presumption against federal preemption of state law." *Id.* at 1179; *see also CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 663-64 (1993) (noting that "court[s] interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption" "[i]n the interest of avoiding unintended encroachment on the authority of the States"). This presumption, however, can be rebutted by a clear declaration of legislative intent to preempt state law. *See Hillsborough County, Fla. v. Automated Medical Lab., Inc.,* 471 U.S. 707, 715-16 (1985) (noting that presumption governs unless preemption "'was the clear and manifest purpose of Congress'") (quoting *Rice v. Sante Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)).

In any preemption analysis, the focus of the inquiry is on congressional intent. *See Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992) (stating that "'"[t]he purpose of Congress is the ultimate touchstone'" of preemption analysis") (quoting *Malone v. White Motor Corp.,* 435 U.S. 497, 504 (1978), quoting *Retail Clerks v. Schermerhorn,* 375 U.S. 96, 103 (1963)); *accord Morales v. Trans World Airlines,* 504 U.S. 374, 383 (1992). Preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Morales,* 504 U.S. at 383 (quoting *FMC Corp.,* 498 U.S. at 56-57) (internal quotation marks omitted). Thus,

> [i]n the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the states to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both or because the state law stands as an obstacle

> to the accomplishment and execution of congressional objectives[.]

Northwest Cent. Pipeline Corp. v. Kansas Corp. Comm'n, 489 U.S. 493, 509 (1989) (citations omitted).

Although "there can be no one crystal clear distinctly marked formula" for determining whether a state statute is preempted, *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941), the United States Supreme Court has identified two ways in which preemption may be accomplished: expressly or impliedly. *Gade v. National Solid Wastes Management Ass'n,* 505 U.S. 88, 98 (1992); *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). To establish a case of express preemption requires proof that Congress, through specific language, preempted the specific field covered by state law. *See Interstate Towing Ass'n, Inc. v. City of Cincinnati, Ohio,* 6 F.3d 1154, 1157 n.3 (6th Cir. 1993). Since the parties concede the absence of any express congressional language indicating that state law is to be preempted by federal law, we consider only the theory of implied preemption in this appeal. To prevail on a claim of implied preemption, "evidence of a congressional intent to pre-empt the specific field covered by state law" must be pinpointed. *See Wardair Canada, Inc. v. Florida Dep't of Revenue,* 477 U.S. 1, 6 and syl. pt. 1, in part (1986).

In deciding whether Congress intended for the federal government to have exclusive control of the inland navigable waterways system, we examine the two recognized types of implied preemption: field preemption and conflict preemption. The United States Supreme Court differentiated these prototypes in *Gade:*

> [F]ield pre-emption[ ] [occurs] where the scheme of federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'" and conflict preemption[ ] [occurs] where "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to

> the accomplishment and execution of the full purposes and objectives of Congress[.]"

505 U.S. at 98 (citations omitted). Without articulating their arguments as such, Appellants rely on the concept of field preemption whereas Appellee utilizes conflict preemption principles to argue his case.

To support their position of field preemption, Appellants emphasize that the United States Government is responsible for the regulation, servicing, and maintenance of the inland navigable waterways system of which the Ohio River is a part. *See* U.S. Const. art. I, § 8 (setting forth powers of Congress); 33 U.S.C. §§ 1-2805 (1994) (designating regulations concerning operation of navigable waters); 49 U.S.C. §§ 101-80504 (1994) (denoting various regulations pertinent to federal transportation policies and programs). Appellants argue that the federal government's almost exclusive control over the waterways indicates a congressional intent to preempt states from imposing any laws governing the use of waterways. In determining whether such congressional intent exists, the law requires evidence "that Congress has determined to 'occupy the field'. . . and thus to pre-empt all state regulation." *Wardair Canada*, 477 U.S. at 6. Appellants contend that Congress has evidenced an intent to "occupy the field" through historical responsibility for the creation, maintenance, improvement, and regulation of the waterways. Additionally, Appellants cite the enactment of The Inland Waterways Revenue Act of 1978 (the "Act"), 26 U.S.C. § 4042, which imposes a federal excise tax on fuel consumption in commercial waterway traffic[9] and 33 U.S.C. § 5 (1994),[10] which

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[9] Pursuant to 26 U.S.C. § 9506, the amounts collected under 26 U.S.C. § 4042 are transferred to the Inland Waterways Trust Fund for construction and rehabilitation of intracoastal and inland waterways.

[10] The pertinent text of 33 U.S.C. § 5 reads:

> No tolls or operating charges whatever shall be levied upon or collected from any vessel, dredge, or other water craft for passing through any lock, canal, canalized river, or other work

(Footnote continued)

prohibits the levying of tolls or operating charges from watercraft passing through any canalized river, as evidence of preemptive intent. [11]

Conversely, Appellee maintains that there is no evidence that Congress wished to preclude states from imposing a fuel use tax in connection with navigation of the inland waterways system. Appellee relies on the fact that, contrary to the exclusive jurisdiction arguments raised by Appellants, West Virginia retains jurisdiction over the Ohio River to the extent its authority has not been preempted by federal law and to the extent that federal law allows states to exercise authority over a river that is part of the inland navigable waterways system. *See, e.g.* 49 U.S.C. § 10541 (c) (1994) (granting individual states power to regulate intrastate transportation by water carriers). In addition, Appellee finds persuasive both the absence of express language prohibiting taxation by the states in pertinent federal legislation and the historical exercise of concurrent taxing jurisdiction by the states over items already taxed by the federal government (e.g. income, fuel, tobacco, alcohol, luxury items and inheritance income). [12]

In support of his position, Appellee cites *Shell Oil Co. v. State Board of Equalization,* 414 P.2d 820 (Cal. 1966), *appeal dismissed,* 386 U.S. 211 (1967), in which the court rejected the taxpayer's claim that the imposition of California's

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> for the use and benefit of navigation, now belonging to the United States or that may be hereafter acquired or constructed . . . .

[11] Because we reject Appellants' attempt to analogize the use tax to a toll which is prohibited pursuant to 33 U.S.C. § 5, we do not discuss this statute at length within the preemption section of this opinion. *See infra* Duty of Tonnage section of this opinion.

[12] Appellants respond to this argument by stating that, unlike navigation of the inland waterways, such commodities are not similarly subject to arguably exclusive control by the federal government. Because our ruling on the issue of preemption is not dependent upon the historical aspect of multiple taxation, we find it unneccessary to address this contention.

sales and use tax law on sales of bunker fuel oil to vessels engaged in interstate and foreign commerce was preempted by the Import-Export and Commerce Clauses of the United States Constitution. In concluding that evidence of preemption was nonexistent, the court in *Shell Oil* explained,

> "There seems little doubt * * that under its power over interstate commerce, Congress can fix the bounds of state taxation of that commerce." Although there has been little direct discussion of the limits of federal preclusion with respect to the area of *taxation,* the rules are fairly clear in the area of *regulation* of commerce. When there is a direct conflict between state and federal statutes, or if the subject demands uniformity of regulation, the state statue must fall; the question of implied prohibition, however, is another matter.
>
> An issue of implied prohibition arises when a federal act impinges on subject matter which a state statute attempts also to regulate, even though there is no direct contradiction between the enactments. "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field * * * is not forbidden or displaced. . . ." (*Kelly v. State of Washington*, 302 U.S. 1, 10, 58 S.Ct. 87, 92 [1937].) The intent to occupy the field is "' * * * not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.'" (*Huron Portland Cement Co. v. City of Detroit,* (1960) 362 U.S. 440, 443, 80 S.Ct. 813, 816, 4 L.Ed2d 852.) There is no reason to believe that the rule as to the implied occupation of the field of taxation is any more strict; it would indeed be difficult to contend that if Congress has taxed a particular item it thereby precludes a state levy against the same item.

414 P.2d at 828-29 (some citations omitted).

The task presented for a court when federal preemption is raised "is to determine whether state regulation is consistent with the structure and purpose of the statute [federal regulation] as a whole." *Gade*, 505 U.S. at 98; *accord Hines*, 312 U.S. at 67. As the Supreme Court in *Wadair Canada* elucidated, "state law is not preempted whenever there is any federal regulation of an activity or industry or area of law." 477 U.S. at 6. Because we find nothing in the imposition of a fuel use tax that contravenes the federal statutes at issue or "impairs the objectives of national policy," we determine that the mere imposition of a federal excise tax pursuant to the Act provides insufficient indicia of a congressional intent to prohibit states from imposing a use tax on fuel consumed by watercraft operating on the inland waterways system. *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1311 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

Much of Appellees' argument focuses on the lack of conflict created as a result of concurrent taxing by the federal government and this state. A conflict occurs "'to the extent it . . . is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'" *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 506 (1990) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)) (finding conflict where California regulatory body imposed stricter requirements than Federal Energy Regulatory Commission governing minimum stream flow of hydroelectric project); *see also Perez v. Campbell*, 402 U.S. 637 (1971) (holding that section of Arizona Safety Responsibility Act requiring drivers unable to pay accident expenses to forfeit licenses conflicted with federal bankruptcy code), *superseded by statute as stated in In re Saunders*, 105 B.R. 781 (Bankr. E.D. Pa. 1989); *Hawaii Newspaper Agency Ltd. Partnership v. Bronster*, No. 95-00635, 1996 WL 67305 at 4 (D. Hawaii 1996) (finding conflict based on state statute acting as "obstacle" to objectives of federal Newspaper Preservation Act). Since we determine that Appellants have failed to

demonstrate the existence of such a conflict, we are without authority to imply that Congress intended to "occupy the field" of inland waterways. *See Huron Portland Cement Co.*, 362 U.S. at 443 (holding that absent a conflict, no intent to "occupy the field" was to be implied). Upon analysis, Appellants' case is simply not prototypical of those where intent to preempt must be inferred because "state regulations could not be enforced 'without impairing the federal superintendence of the field . . . . ' or when the 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Gianturco*, 651 F.2d at 1310 (citation omitted); *cf. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (holding that Arizona tax on fuel used on tribal roads built, maintained, regulated, and policed by federal government was preempted by comprehensive federal regulatory scheme covering harvesting and sale of tribal timber).

COMMERCE CLAUSE

The Commerce Clause is primarily an affirmative grant of power to Congress. "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . ." U.S. Const. art. I § 8, cl. 3. The power to regulate interstate commerce is extraordinarily far reaching and authorizes Congress to preempt a broad spectrum of state laws and regulations. If Congress has not exercised its commerce powers in a given area, state law survives until Congress chooses to step in. Thus, most state laws regulating commerce are written upon a sort of legal palimpsest: state laws remain on the books until Congress chooses to overwrite them. On the other hand, there is a negative impact to the Commerce Clause. Although the Constitution is silent on the subject of protecting interstate commerce where Congress has not acted, the United States Supreme Court has long recognized that "the Commerce Clause is more that an affirmative grant of power; it has negative sweep as well." *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1991) (citing *Gibbons v. Ogden*, 9 Wheat 1, 231-32, 239 (1824)) (Johnson, J., concurring). The negative Commerce Clause "limits the power of the

States to erect barriers against interstate trade." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980). Thus, we must not only consider whether existing federal statutes explicitly grant or reject the authority of the state to act in a particular area, we must also review those decisions discussing the limits of permissible state legislation in terms of whether such legislation burdens or interferes with the free flow of interstate commerce. In doing so, we review the circuit court's judgment de novo because it involves the interpretation of statutes which are questions of law.

Unquestionably, even in the absence of explicit congressional authorization, states may enact laws affecting interstate commerce when such statutes do not discriminate against out-of-state interests and when the legitimate state interests outweigh any burdens on interstate commerce. We have no difficulty in concluding that the West Virginia tax does not directly discriminate against interstate commerce, and further, that its effect is not to favor in-state economic interests over out-of-state interests. In determining Commerce Clause challenges under these circumstances, we are instructed by the Supreme Court to evaluate the validity of state law pursuant to the four-pronged standard established in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977). Under the *Complete Auto* test, state taxes are upheld as nonviolative of the federal Commerce Clause provided that "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279; *accord Maryland v. Louisiana,* 451 U.S. 725, 754. We adopted this same test for determining violations of our state commerce clause in syllabus point one of *Western Maryland Railway Co. v Goodwin*, 167 W. Va. 804, 282 S.E.2d 240 (1981), *appeal dismissed,* 456 U.S. 952 (1982). Appellants argue that the use tax at issue violates the first and fourth prongs of the *Complete Auto* test--the substantial nexus and fairly related tests. *See* 430 U.S. at 279.

That this area of law is nebulous at best is beyond dispute. In *Quill Corp.*, the United States Supreme Court

acknowledged that "our law in this area is something of a 'quagmire' and the 'application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way if precise guides to the States in the exercise of their indispensable power of taxation.'" 504 U.S. at 315-16 (quoting *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 457-48 (1959)). What is clear, however, is that with the issuance of *Complete Auto,* "the court . . . rejected the line of cases holding that the direct taxation of interstate commerce was impermissible and adopted instead a 'consistent and rational method of inquiry [that focused on] the practical effect of [the] challenged tax.'" *Quill Corp.,* 504 U.S. at 303-04 (quoting *Mobil Oil Corp. v. Commissioner of Taxes of Vt.,* 445 U.S. 425, 443 (1980)) (alteration in original). The purpose for which the "practical effect" of a challenged tax is examined is "to determine whether it 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.'" *Mobil Oil,* 445 U.S. 443 (quoting *Complete Auto,* 430 U.S. at 279).

The Supreme Court made it clear in *Quill Corp.* that the "four-part test [of *Complete Auto*] . . . continues to govern the validity of state taxes under the Commerce Clause." 504 U.S. at 310. The Supreme Court injected that

> [u]nder our current Commerce Clause jurisprudence, "with certain restrictions, interstate commerce may be required to pay its fair share of state taxes." *D.H. Holmes Co. v. McNamara,* 486 U.S. 24, 31 (1988); see also *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 623-24 (1981) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of [the] state tax burden even though it increases the cost of doing business") (internal quotation marks and citation omitted).

Quill Corp., 504 U.S. at 310 n.5. Accordingly, we concur with Appellee that the standard by which the Commerce Clause challenge must be examined remains the *Complete Auto* test.[13]

Appellee argues that the case of *Western Maryland,* is controlling on the issue of whether the first prong of the *Complete Auto* test--the requirement of a substantial nexus between the taxpayer and the taxing state--exists. Union Barge, one of the taxpayers involved in that consolidated case, was a Pennsylvania-based corporation that engaged in transporting freight in barges throughout the United States. 167 W. Va. at 822, 282 S.E.2d at 251. This Court found that Union Barge's one-point and pass-through traffic[14] had sufficient contacts with West Virginia to withstand challenges on the grounds of insufficient nexus for assessing this state's carrier tax. *Id.* at 823, 282 S.E.2d at 252. Those factors that

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[13] Appellants assert that the line of fuel tax cases which predate *Complete Auto* should govern this case. *See, e.g., Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972); *Ingels v. Morf,* 300 U.S. 290 (1937). Appellee argues that the cases cited by Appellants involve "user" fees or tolls, the assessment of which involves the use of a public facility, whereas the tax at issue in this case is a general revenue tax on the use of tangible personal property purchased in another state. *See Commonwealth Edison,* 453 U.S. at 621 (explaining that "user" fees or taxes line of cases "were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services"); *Interstate Transit, Inc. v. Lindsey,* 283 U.S. 183, 190 (1931) (explaining that "although termed a tax, ["user" fees or taxes] cannot be tested by standards which generally determine the validity of taxes").While Appellee refers to the tax at issue as a general revenue tax, we find it unnecessary to characterize the use tax as a general revenue tax or otherwise. *See Western Maryland,* 167 W. Va. at 826, 282 S.E.2d at 253 n.3 (noting that form of tax is inconsequential to questions of nexus and state benefits); *but cf. Commonwealth Edison*, 453 U.S. at 622 (stating that "States have considerable latitude in imposing general revenue taxes").

[14] The taxpayer at issue was already paying taxes on its two-point traffic so that type of barge traffic was not in issue. 167 W. Va. at 822, 282 S.E.2d at 251.

this Court found determinative on the issue included: that the taxpayer's wholly-in state business was done primarily to accommodate its customers or other carriers; that barges were loaded and unloaded in this state at docks owned by companies doing business in this state; that the taxpayer benefited by charging its customers a demurrage charge for undue delay in loading and unloading the barges; that periodically, the taxpayer's tugboats and crews purchased food and fuel from West Virginia businesses; that drop-off and pick-up points for the taxpayer's employees were in West Virginia; and that repairs on the barges or tugboats were sometimes necessitated in this state. *Id.* at 824, 282 at 252.

In comparison to the indicia examined in *Western Maryland,* Appellee argues that Appellants' business activities present a more compelling case for finding the requisite nexus. Like the taxpayer in *Western Maryland,* Appellants deliver and pick up goods from various West Virginia businesses while consuming fuel as they travel through this state via navigable waters. Appellants also have in common with the Union Barge taxpayer the utilization of West Virginia docks for loading and unloading as well as the occasional need to have repairs performed while in this state. Those factors that enhance Appellants' connection to this state include both the ownership and leasing of real property in West Virginia as well as in-state offices and the employment of state residents.[15] We agree with Appellee that the requisite degree of nexus has been established within the parameters of *Western Maryland. See* 167 W. Va. at 824-26, 282 S.E.2d at 252-53.[16]

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[15] For example, ORCO leases and operates a coal loading facility at Kenova, West Virginia, where it unloads railroad cars and loads river barges through a conveyor system. Approximately 35 employees work at the Kenova facility. According to the record, many of ORCO's employees, which include managerial employees, boat crews, and sales employees, are West Virginia residents.

[16] The "substantial nexus" argument to some extent derives from *Quill,* tax case in which the Supreme court applied the four part test for determining the validity of a state attempt to tax activities of an out-of-state

(Footnote continued)

The second part of Appellants' Commerce Clause challenge involves the question of whether the use tax is fairly related to the services provided by this state. Citing the United States Supreme Court's decision in *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940), Appellants frame the pertinent inquiry as "whether the state has given anything for which it can ask return." *Id.* at 444. Appellants contend that the fourth prong of *Complete Auto* is not met since they receive no extra benefits from this state in exchange for payment of the use tax in contrast to the same benefits they receive for payment of the other state taxes.[17] In addition, they object to the dedication of the use tax funds for this state's highways. *See* W. Va. Code § 11-15A-13(g).

Edification regarding the nature of the "fairly related" inquiry was provided in *Commonwealth Edison:*

> The relevant inquiry under the fourth prong of the *Complete Auto Transit* test is not, as appellants suggest, the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is closely connected to the first prong of the *Complete Auto Transit* test. Under

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mail-order house. One of these tests required a substantial nexus with the taxing state. Because the tax involved here also has an impact on interstate trade, we believe that *Quill* compelled us to distinguish it. *Quill* involved a tax that directly burdened interstate commerce, and virtually every precedent relied upon by the Court in deciding *Quill* was concerned with attempts by the state to tax interstate commerce directly. The difference between *Quill* and this case is that *Quill* concerned a state's attempt to extend its taxing authority beyond its borders and that case has little application to cases involving a state's attempt to collect taxes on interstate trade and commerce. We do not construe the West Virginia law as an attempt by this state "to control conduct beyond the boundaries of the State." *Healy v. Beer Institute,* 491 U.S. 109 S.Ct. 2491, 2499, 105 L.Ed.2d 275 (1989).

[17] Appellants state that, in addition to the fuel use tax, they pay taxes to this state on carrier income, corporate net income, business franchise, business registration and ad valorem property.

> this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. Beyond that threshold requirement, the fourth prong of the *Complete Auto Transit* test imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a "just share of state tax burden." *Western Live Stock v. Bureau of Revenue,* 303 U.S. [250],[ ] 254 [1938].

453 U.S. at 625-26 (footnotes and citation omitted). Having ruled above that the necessary nexus exists between Appellants and this state, we need only examine whether the measure of the use tax is reasonably related to Appellants' presence in this state. *Id.*

The measure of West Virginia's fuel use tax is five percent of the "average wholesale price" of fuel "used" within this state. W. Va. Code § 11-15A-13. Thus, it is expressly apportioned relative to that amount of fuel consumed within this state. When examining this same issue in *Commonwealth Edison,* the United States Supreme Court concluded,

> Because it [coal severance tax] is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities. When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.' *Exxon Corp. v. Wisconsin Dept. of Revenue,* 447 U.S. [207], [ ] 228 [1980], quoting *Japan Line, Ltd. v.*

> *County of Los Angeles,* 441 U.S. [434], [ ] 445 [1979].

609 U.S. at 626-27 (some citations omitted).

For the same reasons stated in *Commonwealth Edison,* we conclude that the fourth prong of *Complete Auto* is met in this case. We wholesalely reject Appellants' notion that it is entitled to additional benefits for each tax paid to this state. Taxes are not paid to the state on a quid pro quo basis. It is sufficient for the fairly related test that a taxpayer receives the customary services provided by a state in response to the expectations and demands of a civilized society, such as fire and police protection, opportunities to seek emergency hospital care, food and fuel sources, a trained work force, and judicial access. *See Commonwealth Edison,* 609 U.S. at 626-27; *Western Maryland,* 167 W. Va. at 826-27, 282 S.E.2d at 253-54. As we explained in *Western Maryland,* all of these state provided services and benefits, whether utilized or not, "contribute to the viability of . . . [Appellants'] operations overall." *Id.* at 827, 282 S.E.2d at 253.

Appellants attempt to find constitutional invalidity on the grounds that their payment of the use tax is not used to improve or maintain this state's navigable waterways. Again, Appellant's have misconstrued the concerns inherent in the Commerce Clause. *See Quill Corp.,* 504 U.S. at 312 (distinguishing Due Process concerns regarding fundamental fairness of governmental activity from Commerce Clause considerations "about the effects of state regulation on the national economy"). There simply is no requirement that the tax imposed result in a direct and attributable benefit to a taxpayer. As noted in *Commonwealth Edison,*

> the linchpin of appellants' contention is the incorrect assumption that the amount of state taxes that may be levied on an activity connected to interstate commerce is limited by the costs incurred by the State on account of that activity . . . . But as we have previously noted, interstate commerce may be required to contribute to the cost of providing *all*

> governmental services, including those services from which it arguably receives no direct "benefit." . . . [Moreover,] it is difficult to see how the court is to go about comparing costs and benefits in order to decide whether the tax burden on an activity connected to interstate commerce is excessive.

609 U.S. at 627 n.16 (citation omitted). Despite Appellants' claims of deriving no benefit from the roads of this state, we can conceive of numerous instances when this state's road system is used for the benefit, direct and indirect, of Appellants.[18] In any event,

> "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the State has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society," *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

Western Maryland, 167 W. Va. at 827, 282 S.E.2d at 254.

The fourth prong of the *Complete Auto Transit* test requires only that the *measure* of the tax be reasonably related to the extent of the taxpayer's contact with the State, "since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of the state tax burden[.]'" *Commonwealth Edison*, 453 U.S. at 610 (quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)). Appellants' have failed to "show that the formula [for use tax calculation] places a burden upon interstate commerce in a constitutional sense." *Northwestern States*

---

[18] Two obvious examples of state road usage are commodities delivered within this state that are transported further via the road system and employees commuting to a pick-up spot. Simply stated, the provision and maintenance of this state's road system does contribute to the viability of Appellants' business operations.

Portland Cement, 358 U.S. at 463. Accordingly, we reject Appellants' claims predicated on Commerce Clause violations.[19]

EQUAL PROTECTION

Appellants raise the ancillary claim that equal protection principles are violated by virtue of comparing its pass-through traffic to that of another taxpayer found not to owe the use tax on its pass-through traffic. Appellants claim that there is no rational basis for distinguishing the holding in Administrative Decision 86-937 RGU. In that case, the state tax commissioner concluded that the taxpayer involved "flunked" the four prong test of *Complete Auto*. *See* 430 U.S. at 279. At the center of any equal protection analysis is the precept that similarly situated persons within the same class are to be treated equally. *See* Syl. Pt. 5, *Tony P. Sellitti Constr. Co. v. Caryl,* 185 W. Va. 484, 408 S.E.2d 336 (1991), *cert. denied,* 502 U.S. 1073 (1992). However, as Appellee points out, the State Tax Commissioner has already addressed this specific issue and determined that the Appellants in this case and the taxpayer in the referenced administrative proceeding are "not identically, nor, indeed, even similarly situated[.]" Moreover, as Appellee notes, because the record pertaining to Administrative Decision 86-937 RGU is not included as part of the record in this case, this Court is without a basis for determining whether the Appellants are similarly situated to the taxpayer in that case. Accordingly, we find no merit to Appellants' equal protection claim.

---

[19] We similarly reject Appellants' Due Process claims, but find it unnecessary to separately address those arguments because, as has been noted, "the '*Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well . . . due process requirements[s].'" *Quill Corp.,* 504 U.S. at 313 n.7 (commenting further that this "might suggest that every tax that passes contemporary Commerce Clause analysis is also valid under the Due Process Clause") (quoting *Trinova Corp. v. Michigan Dep't of Treasury,* 498 U.S. 358, 373 (1991)); *see generally Quill Corp.,* 504 U.S. at 312-13 (discussing difference between Due Process and Commerce Clause concerns).

DUTY OF TONNAGE

Appellants argue that the special fuel use tax violates the Duty of Tonnage Clause which provides that: "No state shall, without the Consent of Congress, lay any Duty of Tonnage. . . . " U.S. Const. art. I, § 10, cl. 3. Appellee concurs that a charge or duty for the privilege of "entering, trading in or lying in" a port, harbor or waterway is forbidden by the Duty of Tonnage Clause. *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n,* 296 U.S. 261, 266 (1935). Appellee argues, however, that the use tax at issue is not a duty or charge on the entry into or right of navigation on West Virginia waters, but merely an excise tax on the use of special fuel. *See id.* at 264-65 (discussing historical basis for prohibition against duties of tonnage).

To support his position, Appellee cites the decision in *American Commercial Barge Line Co. v. Marcum,* 360 S.W.2d 134 (Ky. 1962), in which the court upheld the Kentucky net income tax against Duty of Tonnage charges. In that case, the taxpayer raised the same argument as Appellants that the tax amounted to an impairment of its free right of navigation on the Ohio River. The Kentucky Supreme Court firmly rejected this contention, finding that the tax was not a prohibited duty of tonnage, but merely a tax on profits gained from business activity within the state. *Id.* at 135.

Additional insight on this issue is provided by the decision in *In re Los Angeles Lumber Products Co.,* 45 F. Supp. 77 (S.D. Cal. 1942), in which the court upheld a use tax assessed against a barge purchased outside the state and then brought into the state for use upon navigable waters. Rejecting the taxpayer's argument that the use tax constituted a charge for entering, trading, or lying in port in violation of the Duty of Tonnage Clause, the court reasoned:

> The use or "compensating" tax was devised to equalize taxes in order that those who sold articles manufactured within a state to buyers therein would not be placed at a disadvantage in competition with

> goods manufactured in other states and sold to buyers within the state.
>
> The prohibition in the federal constitution against the imposition of duties of tonnage was a part of the scheme to give Congress control over the interstate and foreign commerce of the nation. . . .
>
> . . . .
>
> . . . It is a tax upon something which occurs *after* the ship has entered the port, viz., the use, storage or consumption of the property within the state.

Id. at 81-82 (citations omitted and emphasis supplied).

Appellants urge this Court to view the use tax at issue as a charge for navigation of the rivers in violation of the Duty of Tonnage Clause. If this use tax were solely imposed for fuel consumption on the waters of this state, Appellants' arguments would be more convincing. The use tax at issue, however, is not a prohibited toll on the use of this state's navigable waterways, but an excise tax on the use of fuel which is imposed on *all* motor carriers operating within this state, including, buses, trucks, trains, and aircraft. *See* W. Va. Code §§ 11-15A-13(d), 11-15-18(c)(6). Consistent with the objectives of all use taxes, it is implemented for the purpose of equalizing the effect of purchases from out-of-state suppliers for the benefit of in-state sellers. *See In re Los Angeles Lumber Products*, 45 F. Supp. at 81; *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581 (1937). Accordingly, we find no prohibited charge within the purview of the Duty of Tonnage Clause.

NORTHWEST ORDINANCE AND VIRGINIA COMPACT

Finally, Appellants suggest that the use tax violates the Northwest Ordinance of 1787 and the Virginia Compact of 1789, which each contain language declaring that the Mississippi River and its tributaries shall remain respectively "forever free" and "free." Both parties acknowledge that this

issue has been considered and rejected by this Court in *American Barge Line Co. v. Koontz*, 136 W. Va. 747, 68 S.E.2d 56 (1951); *overruled on other grounds by Western Maryland*, 167 W. Va. at 823, 282 S.E.2d at 252 (1981). In *Koontz*, this Court squarely denounced the taxpayer's argument that the Northwest Ordinance prohibited West Virginia from imposing its business tax on the gross income of barge companies operating on the Ohio River. 136 W. Va. at 756-58, 68 S.E.2d at 61-62. We concluded in *Koontz*, that upon each state's admission into the union of the United States of America, that state was placed on equal footing with each of the original states and accordingly, each state had "'the same power to regulate navigable waters within its borders . . .; that is to say, until Congress intervenes, the power of the State, locally exerted, is plenary * * *.'" 136 W. Va. at 757, 68 S.E.2d at 62 (quoting *Economy Light & Power Co. v. United States*, 256 U.S. 113[, 121] (1921). The *Koontz* court concluded that the entry into statehood necessarily resulted in the supersedence of these compacts by the United States Constitution. 136 W. Va. at 757-58, 68 S.E.2d at 61-62. We find no basis for disturbing this Court's ruling in *Koontz*. Accordingly, we reject Appellants' final argument.

Having considered each of Appellants' constitutional challenges and finding them in turn to be without merit, we rule that the fuel use tax that is imposed pursuant to West Virginia Code § 11-15A-13, as it relates to fuel consumed on the inland waterways, does not violate the federal constitution or any other law. Accordingly, the decision of the Circuit Court of Kanawha County is hereby affirmed.

Affirmed.

Appendix B

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
95 JAN 30 AM 8:1?
/s/ CG

CATHY S. GATSON CLERK
KANAWHA COUNTY
CIRCUIT COURT

HARTLEY MARINE CORP., a Delaware corporation,

Petitioner,

v.

CIVIL ACTION NO. 90-AA-171

ALAN L. MIERKE, State Tax Commissioner of West Virginia,

Respondent.

HARTLEY MARINE CORP., a Delaware corporation,

Petitioner,

v.

CIVIL ACTION NO. 92-AA-64

ALAN L. MIERKE, State Tax Commissioner of West Virginia,

Respondent.

THE OHIO RIVER COMPANY, a West Virginia corporation,

Petitioner

v.

CIVIL ACTION NO. 92-AA-91

JAMES H. PAIGE, III, State Tax
Commissioner of West Virginia,

Respondent.

FINAL ORDER

These cases are before the Circuit Court of Kanawha County as appeals from Administrative Decisions issued by the State Tax Commissioner of West Virginia. Because all three administrative appeals involve common questions of law and fact, this Court granted the joint motion of the parties for consolidation. Each case involves questions relating to the validity of the West Virginia tax imposed by Chapter 11, Article 15A, Section 13 of the Code of West Virginia of 1931, as amended, as applied to Petitioners' river transportation businesses.

Hartley Marine Corp. v. Mierke, Civil Action No. 90-AA-171, is an appeal from the State Tax Commissioner's Administrative Decision affirming an assessment of gasoline and special fuel use tax in the amount of $8,608.94 plus statutory interest covering the period January 1, 1985 through December 31, 1987.

Hartley Marine Corp. v. Mierke, Civil Action No. 92-AA-64, is an appeal from the State Tax Commissioner's Administrative Decision denying Petitions for Refund of gasoline and special fuel use tax filed by Hartley Marine Corp. for the period April 1, 1983 through April 30, 1986, and July 1, 1986 through March 30, 1990, in the total amount of $123,989.64.

The Ohio River Company v. Paige, Civil Action No. 92-AA-91, is an appeal from the State Tax Commissioner's Administrative Decision denying Petitions for Refund of gasoline and special fuel use tax filed by The Ohio River Company for the periods April 1, 1983 through April 30, 1986, and July 1, 1986 through March 30, 1990, in the total amount of $1, 062,402.88.

The common issues challenge the validity of the West Virginia fuel use tax as applied to fuel consumed in watercraft

engaged in interstate commerce on the inland waterways. The Petitioners contend that under the facts of the cases, the tax violates the Commerce Clause and the Due Process Clause of the United States Constitution, constitutes an unlawful duty of tonnage prohibited by Article I, Section 10, Clause 3 of the United Stated Constitution, violates the terms of the Northwest Ordinance of 1787 and the Virginia Compact of 1789 and directly conflicts with the United States Government's preemption of the jurisdiction of navigable waterways, including the jurisdiction to tax fuel used thereon.

The facts pertinent to the issues in these cases are found in the administrative record of each case heretofore filed with the Court. The administrative record consists of the transcript of the proceedings before the State Tax Commissioner's designated Hearing Examiner together with the exhibits admitted to the record at said proceedings and the Administrative Decision issued by the State Tax Commissioner or his designated representative in each case.

In each of the administrative proceedings below, the parties entered into a Joint Stipulation of facts which are the same in each case with the exception of references to specific amounts off fuel use tax paid or assessed with respect to each Petitioner.

By decision dated November 17, 1994 in a case styled *M/G Transport Services, Inc. v. Alan L. Mierke, Tax Commissioner of the State of West Virginia,* (Civil Action No. 92-AA-67), Judge Charles E. King, Jr. of this Circuit held in a similar case that the Petitioner's Assignments of Error were without merit and that the decision of the State Tax Commissioner was correct. After due consideration of the Petitioners' briefs and arguments of counsel, this Court is also of the opinion that the Petitioners' Assignments of Error are without merit.

Inasmuch as the Commissioner has made a proper decision, this Court does hereby adopt as its own the Findings of Fact and Conclusions of Law made by the State Tax Commissioner.

ACCORDINGLY, it is hereby **ORDERED** that the decisions of the State Tax Commissioner herein be, and the same are, hereby *AFFIRMED.*

The Clerk of this Court is hereby directed to send a certified copy of this Final Order to all counsel of record herein. It is further **ORDERED** that *these cases* be **dismissed and stricken from the docket if this Court.**

The Court notes the objections and exceptions of any party or parties aggrieved by this Final Order.

DATED this the 26th day of January, 1995.

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA. 98.
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 13 DAY OF SEPTEMBER 1996

/s/ Cathy S. Gatson, Clerk
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ENTER:

/s/ Robert K. Smith
ROBERT K. SMITH, SENIOR JUDGE

RECORDED

Appendix C

IN THE CIRCUIT COURT OF KANAWHA COUNTY WEST VIRGINIA

FILED

94 NOV 17 PM 3:22

/s/ CG

CATHY S. GATSON, CLERK
KANAWHA COUNTY
CIRCUIT COURT

M/G TRANSPORT SERVICES, INC.,
an Ohio corporation,

Petitioner/Appellant,

v. CIVIL ACTION NO. 92-AA-67

ALAN L. MIERKE,
TAX COMMISSIONER OF THE STATE
OF WEST VIRGINIA,

Respondent/Appellee.

FINAL ORDER

This appeal involving the gasoline and special fuel use tax is before the Court for judicial review and consideration pursuant to *W. Va. Code,* §11-10-10.

This matter came before the Tax Commissioner of the State of West Virginia upon a petition for refund and a petition for reassessment, which issues were consolidated for purposes of hearing and decision. By decision dated December 30, 1991, the State Tax Commissioner denied the Appellant's petition for refund and affirmed the assessment for the period in question.

The petition for refund involved taxes paid for the period of January 1, 1988, through Sepember 30, 1989, in the amount of $118,372.20, plus interest.

The petition for reassessment involved taxes assessed against M/G Transport Services, Inc. ("Appellant") for the period of January 1, 1988, through September 30, 1990, in the amount of $52,046.89, plus $4,106.94 interest. The parties entered into a stipulation of facts for purposes of the administrative hearing before the Tax Commissioner, and the same are not disputed here.

The Appellant makes numerous constitutional arguments in its assignments of error and maintains the tax at issue violates the Supremacy Clause, the Due Process Clause and the Commerce Clause of the United States Constitution, as well as the West Virginia Constitution, the Northwest Ordinance of 1787, and the Virginia Compact of 1789.

After a thorough review of the record and careful consideration of all assignments of error set forth in the petition in this matter, the Court finds each of them to be without merit. The Court further concludes the decision of the State Tax Commissioner is not plainly wrong nor contrary to law. In reaching this decision, the Court has made the requisite "independent review" of the record and has not merely adopted in a mechanistic manner the findings of fact and conclusions of law made by the Commissioner. *See, South Side Lumber Co. v. Stone Construction Co.*, 151 W.Va. 438, 152 S.E.2d 721 (W.Va. 1967).

Inasmuch as the Commissioner had made a proper decision in this case, this Court does hereby adopt as its own the findings of fact and conclusions of law made by the State Tax Commissioner.

Accordingly, this Court does hereby ORDER the decision of the State Tax Commissioner dated December 30, 1991, is affirmed.

The Court does further ORDER that a certified copy of this Final Order be sent to all parties or counsel of record. This Court notes the objection and exception of the party or parties aggrieved by this Final Order.

This Court does hereby further ORDER that this matter be and the same is hereby dismissed and stricken from the docket of this Court.

Enter this 17th day of Nov., 1994.

/s/ Charles E. King

CHARLES E. KING, JR., Circuit Judge
Thirteenth Judicial Circuit

RECORDED

Appendix D

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

95 FEB -8 PM 2:29

/s/ CG

CATHY S. GATSON, CLERK
KANAWHA COUNTY
CIRCUIT COURT

CROUNSE CORPORATION,
a Kentucky corporation,

Petitioner,

v. CIVIL ACTION NO. 93-AA-50

JAMES H. PAIGE, III, State
Tax Commissioner of West Virginia,

Respondent.

FINAL ORDER

This appeal involving the gasoline and special fuel use tax is before the Court for judicial review and consideration pursuant to *W. Va. Code*, §11-10-10.

This matter came before the Tax Commissioner of the State of West Virginia ("Commissioner") upon petitions for refund of gasoline and special fuel use tax filed by Crounse Corporation ("Appellant") for the periods April 1, 1983 through March 31, 1986, and July 1, 1986 through December 31, 1991. The total amount at issue is $325,662.43, plus interest. The petitions for refund were consolidated for purposes of hearing and decision before the Commissioner.

The parties entered into a stipulation of facts for purposes of the administrative hearing before the Commissioner, and the same are not disputed here.

The appellant contends the West Virginia special fuel use tax is invalid as applied to fuel consumed by watercraft operated in connection with the appellant's river transportation business while traveling on the navigable inland waterways in West Virginia. Specifically, the appellant argues the tax at issue is in violation of the Supremacy Clause, the Due Process Clause, the Commerce Clause and the Duty of Tonnage Clause of the United States Constitution; the Constitution of West Virginia; the Northwest Ordinance of 1787 and the Virginia Compact of 1789.

After a thorough review of the record in this matter and careful consideration of all assignments of error set forth in the petition for appeal, this Court finds each of the assignments of error to be without merit. The Court further concludes the decision of the State Tax Commissioner is not plainly wrong nor contrary to law.

In reaching this decision, the Court has made the requisite "independent review" of the record and has not merely adopted in a mechanistic manner the findings of fact and conclusions of law made by the Commissioner. *See*, *South Side Lumber Co. V. Stone Construction Co.*, 151 W.Va. 438, 152 S.E.2d 721 (1967). Inasmuch as the Commissioner has made a proper decision in this case, this Court hereby adopts as its own the findings of fact and conclusions of law made by the State Tax Commissioner.

Accordingly, this Court hereby **ORDERS** the decision of the State Tax Commissioner dated January 26, 1993, is affirmed. This Court notes the objection and exception of all parties aggrieved by this Final Order.

The Court does hereby **FURTHER ORDER** that a certified copy of this Final Order be sent to all counsel of record, and this case be dismissed and stricken from the docket of this Court.

Enter this 8th day of Feb., 1995.

/s/ Charles E. King

CHARLES E. KING, JR., Circuit Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA. 98.
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 4 DAY OF SEPTEMBER 1996

/s/ Cathy S. Gatson, Clerk
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

RECORDED

Appendix E

This is to certify that this is a true and correct copy.

/s/ Randall B. Suter

HEARING EXAMINER, W.Va.
STATE TAX DEPARTMENT

Subscribed and sworn before me this 10th day of April, 1991

/s/ Karen L. Light, Notary Public

My Commission Expires 11/5/91

State of West Virginia

Department of Tax and Revenue

Charleston 25305

GASTON CAPERTON
GOVERNOR

CHARLES O. LORENSEN
SECRETARY

BEFORE THE COMMISSIONER OF THE STATE OF WEST VIRGINIA

In the Matter of the Petition of	)	AUDITING DIVISION
Hartley Marine Corp. 1400 - 580 Building P. O. Box 1460 Cincinnati, OH 45201	))))	DOCKET NO. 88-422G File No. 31 099 3262 001
PRESIDING HEARING EXAMINER:		Randall B. Suter
PETITIONER REPRESENTED BY:		G. Thomas Battle, Attorney at Law Spilman, Thomas Battle & Klostermeyer P. O. 273 Charleston, WV 25321-0273

AUDITING DIVISION REPRESENTED BY:	Robert Rodak, Staff Attorney
DATE, TIME AND PLACE OF HEARING:	November 22, 1988 at 9:30 a.m. State Tax Department 1001 Lee Street, East Charleston, WV 25301

ADMINISTRATIVE DECISION

Pursuant of a field audit, an assessment was issued against Hartley Marine Corp. ("Petitioner") on May 31, 1988 by Dan R. Taylor, Director, Auditing Division of the State Tax Department, pursuant to the authorization of Michael E. Caryl, then State Tax Commissioner, for use tax on gasoline and special fuel imposed by article 15, chapter 11 of the Code of West Virginia, 1931, as amended. The period of the field audit was January 1, 1985 through December 31, 1987; and the assessment was for tax of $8,608.94 plus statutory interest of $1,287.82, for a total assessment of $9,898.76. Petitioner timely filed a petition for reassessment denying liability for the amount assessed. The matter was set for hearing and Petitioner was given notice of the date, time and place of the hearing.

Randall B. Suter, a hearing examiner designated to hold the hearing, determined that all notices had been properly given and called the matter on for hearing at 9:30 a.m. on November 22, 1988.

Statement of Facts

The facts relevant to disposition of this matter are set forth in the petition for reassessment filed by Petitioner, the joint stipulations of the parties, and the record of the administrative hearing.

Petitioner is incorporated under the laws of the State of Delaware and is qualified to do business in West Virginia. Its principal office is located in Cincinnati, Ohio.

Petitioner's business activities in West Virginia include the operation of a midstream refueling facility[1] at Point Pleasant, West Virginia, and a barge towing business through its operating division, R & W Marine, Which operates on the Ohio, Tennessee and Mississippi Rivers. Petitioner maintains an office, bulk fuel storage barges and small towboat at Point Pleasant, West Virginia. There is a parking lot for Petitioner's employees. Most refuelings are done at mid-stream. Occasionally there are dockside refuelings. Petitioner's towing business in West Virginia consisted solely of pass-through traffic during the audit period. Petitioner had no one point or two point West Virginia business.[2] Petitioner operates a repair facility (Walker Boat Yard), fleeting service (Walker Barge Fleeting Service) and midstream fueling service (Walker Midstream Fuel and Service) at Paducah, Kentucky. In the event of a medical emergency, Petitioner's employees could make use of West Virginia medical facilities depending on how close they are to the facilities.

In addition to the use tax which Petitioner paid on gasoline and special fuel during the audit period, Petitioner paid West Virginia business and occupation tax and carrier income tax

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[1] A mid-stream fueling operation consists of a single barge with a small towboat on the back that goes out to the larger tow boats that operate on the Ohio River, to supply water, fuel and sometimes other provisions. The mid-stream fueling unit ties off to the side of the line-haul boat pumps off the fuel oil while the line-haul maintains steerage and is still moving up or down the river, although at a reduced speed.

The reason the line-haul boat keeps moving is that if it tried to stop it would be pushed onto the shore or would lose control of the barges through the force of the river's current and winds.

[2] One point West Virginia towing business is business that begins or ends West Virginia but does not both begin and end in West Virginia. The other point, whether it be the origination or destination point, is located in another state.

Two point West Virginia towing business is business that both begins and ends in West Virginia.

until July 1, 1987,[3] corporation license tax and business registration tax. Petitioner also paid business and occupation tax imposed by the City of Point Pleasant, West Virginia, and ad valorem property taxes on its property in West Virginia.

Petitioner's line-haul tow boats, which are the boats generally moving up and down the Ohio River, have two propulsion engines fueled by diesel fuel. In the event one of those engines goes down, the boat can still maneuver with a single engine. If at all possible, engine repairs will be made in transit. If the engine cannot be repaired, the tow boat will be taken to Petitioner's Walker Boat Yard in Paducah, Kentucky, if possible. (It is common for routine engine maintenance, such as changing oil and filters, etc., to be done while the tow boat is running. When maintenance is done, one engine is shut down and the tow boat operates on the other engine.)

Because Petitioner is engaged in the business of transporting tangible personal property by watercraft, Petitioner is treated as a "motor carrier" for purposes of calculating Petitioner's consumers sales and use tax liability with respect to the diesel fuel it consumes in the operation of its watercraft. In addition to transportation of passengers or freight by bus or truck, "motor carrier" is defined in W. Va. Code § 11-15-18(c)(6) to include "any aircraft, barge or other watercraft or locomotive transporting passengers or freight in or through this state."[4]

Petitioner began paying the West Virginia use tax on gasoline and special fuel when it took effect April 1, 1983. This tax was paid under protest because Petitioner believes that

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[3] The carrier income tax imposed by W. Va. Code § 11-12A-1 *et seq.* was repealed as of July 1, 1987.

The business and occupation tax imposed by W. Va. Code § 11-13-1 *et seq.* was repealed for most taxpayers, including this Petitioner, as of July 1, 1987.

[4] The definitions in West Virginia 11-15-18(c) also apply to the use tax. W. Va. Code § 11-15A-13(c).

House Bill 1657 is unconstitutional. Petitioner continued paying the use tax under protest until April of 1986 when the Circuit Court of Kanawha County issued its decision in *Waterways Association of Pittsburgh v. Rose, infra.* After remedial legislation was enacted in July of 1986 allowing credit for sales tax paid on fuel purchased in another state but consumed in this State, Petitioner resumed paying under protest the use tax calculated under W. Va. Code § 11-15A-13(d).

Although the period of the audit was January 1, 1985 through December 31, 1987, the assessment is for use tax due on special fuel consumed in Petitioner's watercraft during the period April 1, 1986 through September 30, 1986, which Petitioner failed to pay when it was due.

PERIOD	TAX	DUE DATE
April 1, 1986 - June 30, 1986	$7,506.39	July 25, 1986
July 1, 1986 - September 30, 1986	1,404.99	October 25, 1986
	$8,911.38	

The audit revealed that during calendar year 1987, Petitioner had overpaid its use tax liability by $150.58. This amount was credited against the 1986 deficiency resulting in a net assessment for tax of $8,608.94 plus statutory interest.

West Virginia imposes a broad base consumers sales and service tax. W. Va. Code § 11-15-1 *et seq.* For the privilege of selling of tangible personal property or taxable services vendors are required to collect consumers sales tax from the purchaser. W. Va. Code § 11-15-3 [1981] (amount of tax). *See also* W. Va. Code § 11-15-2(5) [1969] (defining "vendor") and (9) [1969] (defining "service" or "selected service"). The intent of the consumers sales tax law is that the tax "be passed on to and be paid by the ultimate consumer." W. Va. Code § 11-15-10 [1943]. A vendor may not represent, advertise or state to the public or to any purchaser, lessee or employee that the vendor will absorb or assume payment of any part of the

tax. W. Va. Code § 11-9-7 (W. Va. Tax Crimes and Penalties Act; false statements to purchasers, etc.) [1984].

West Virginia also imposes a compensating use tax. W. Va. Code § 11-15A-1 *et seq.* The Legislature intends for the consumers sales tax and the use tax ("consumers sales and use taxes") to be complimentary laws and wherever possible "be construed and applied to accomplish such intent as to the imposition, administration and collection of such taxes." W. Va. Code § 11-15-1a (legislative findings) [1969] and § 11-15A-1a (legislative findings) [1969].

Prior to April 1, 1983, the sale of gasoline and special fuel was exempt from the consumers sales tax under W. Va. Code § 11-15-9 (exemptions) [1981][5]; and the use of gasoline and special fuel was exempt from use tax under W. Va. Code § 11-15A-3 (exemptions) [1981].[6]

---

[5] Prior to amendment in 1983, W. Va. Code § 11-15-9 (exemptions) read in relevant part:

> The following sales and services should be exempt:
>
> (1) Sales of gasoline [including special fuel], taxable under article fourteen, chapter eleven of the Code, one thousand nine hundred thirty-one; ....

[6] Prior to amendment in 1983, W. Va. Code § 11-15A-3 (exemptions from use tax) read in revelant part:

> The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this article:
>
> 2. Tangible personal property, the gross receipts from the sale of which are exempted from the retail sales tax by the terms of sections three-a and nine, article fifteen, chapter eleven of the Code...
>
> 3. Tangible personal property, the gross receipts from the sale of which are derived from the sale of machinery, supplies and materials to contractors, or to persons engaged in the business of manufacturing, transportation, transmission, communication or in the production of natural resources in this State....

(Footnote continued)

More specifically, Petitioner's diesel fuel was exempt from West Virginia consumers sales and use taxes because sales of tangible personal property (including gasoline and special fuel) to persons engaged in this State in the business of transportation were exempt from consumers sales tax under W. Va. Code § 11-15-9(6) [1981], and Petitioner is engaged in the business of transportation. W. Va. Code § 11-15-9(6) [1981] read in relevant part:

> (6) ... sales of property or services to persons engaged in this State in the business of contracting, manufacturing, transportation, transmission, communication, or in the production of natural resources: *Provided, however,* That the exemption herein granted shall apply only to services, machinery, supplies and materials directly used or consumed in the businesses or organizations named above.

Petitioner's use of diesel fuel was exempt from use tax under W. Va. Code § 11-15A-3 [1981].

In FY 1981-82, the Legislature appropriated over 57 million dollars of general revenue to the Road Fund. In his 1983 State of the State Address to a joint session of Legislature, Governor John D. Rockefeller IV recognized that the General Revenue Fund could not support such a transfer in FY 1983-84 and that a permanent source of additional funds for the Road Fund was needed. The Governor proposed a five percent sales tax on gasoline and special fuel. Governor Rockefeller's Address reads in relevant part:

> "As you know in the past we have transferred funds from the general revenue budget into the road fund to cover glaring deficiencies in that critically important area.

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5. Tangible personal property the sale of which in this state is not subject to the West Virginia consumers sales tax.

> "Last year [FY 1981-82], in fact, we transferred over fifty-seven million dollars from the general revenue fund into the state road fund.
>
> "It should be obvious to everyone by now that we cannot afford to do this in next year's budget.
>
> "At the same time, you should know that to date this fiscal year [FY 1982-83] our road fund revenues have fallen six million dollars below estimate."
>
> "I believe the road situation mandates an additional revenue measure specifically for the road fund, and I am therefore proposing a five percent sales tax on gasoline at the wholesale level which would generate fifty million sorely needed dollars for our Department of Highways program.
>
> "To maintain our current level of services in the Department of Highways would actually require new revenues in the amount of eighty-five million dollars. Furthermore, the situation in that department will be worsened with the layoff of over 350 additional employees."
>
> "The fifty million dollars in new revenues that I am proposing tonight will provide us with the thirty million dollars we will need as our State match to get more than one hundred twenty million dollars in federal highways money that will become available next year.
>
> "This revenue increase will give us a desperately needed twenty million dollars for our secondary roads and bridges."

1983 Journal of the West Virginia House of Delegates, Regular Session, pg. 46, 55-56.

House Bill 1657 was introduced at the request of Governor Rockefeller on February 3, 1983. *Id.*, at pg. 354. On February 18, 1983, the West Virginia Legislature passed Com. Sub. for

H. B. 1657, ("House Bill 1657") amending articles 14, 14A, 15 and 15A, chapter 11 of the West Virginia Code.[7] House Bill 1657 took effect on April 1, 1983, and provides for imposition of the consumers sales and use taxes on the sale, use or consumption of gasoline and special fuel in West Virginia.[8]

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[7] To facilitate ease of administration and compliance, the Tax Commissioner may require persons liable for both the consumers sales tax on gasoline and special fuel and the gasoline and special fuel excise tax imposed by W. Va. Code § 11-14-3 to file a combined return for both taxes. W. Va. Code § 11-15-18(f). The consumers sales tax on gasoline and special fuel is due on the 25th day of the month following the close of the period covered by the return. W. Va. Code § 11-15-18(e). However, under W. Va. Code § 11-14-8 the gasoline and special fuel excise tax was not due until the last day of the month. To encourage use of a combined return of both taxes, section 11-15-18(f) of House Bill 1657 changed the due date of the gasoline and special fuel excise tax return to the 25th day of the month.

To facilitate ease of administration and compliance, the Tax Commissioner may require motor carriers liable for both the use tax on gasoline and special fuel and the motor carrier road tax imposed by W. Va. Code § 11-14A-3 to file a combined return for both taxes. W. Va. Code § 11-15A-13(f). The use tax on gasoline and special fuel is due on the 25th day of the month following the close of the period covered by the return. W. Va. Code § 11-15A-13(e). The motor carrier road tax return was not due until the last day of such month. W. Va. Code § 11-14A-6. To encourage use of a combined return for both taxes, section 11-15A-13(f) of House Bill 1657 changed the due date of the motor carrier road tax return to the 25th day of the month.

These were the only changes House Bill 1657 made to articles 14 and 14A, chapter 11 of the West Virginia Code.

[8] The title to Enrolled Committee Substitute for H.B. 1657 (1983) reads in part:

> "AN ACT to amend and reenact section nine, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article fifteen by adding thereto a new Section, designated section eighteen; t amend and reenact section three, article fifteen-a of said chapter eleven; and to further amend said article fifteen-a by adding thereto a new section, designated section thirteen, *all relating to imposing the consumers sales and service tax on sales of gasoline and special fuel,* generally

(Footnote continued)

W. Va. Code § 11-15-18a (sales tax on gasoline and special fuel) and § 11-15A-13 (use tax on gasoline and special fuel).

The term "gasoline" is broadly defined in W. Va. Code § 11-15-18(c)(4) which reads:

> "Gasoline" shall mean and include any product commonly or commercially known as gasoline, regardless of classification, suitable for use as fuel in an internal combustion engine, except special fuel as hereinafter defined, including any product obtained by blending together any one or more products, with or without other products, if the resultant product is capable of the same use.

The term "special fuel" is broadly defined in W. Va. Code § 11-15-18(c)(9) which reads:

> "Special fuel" shall mean and include any gas or liquid, other than gasoline, used or suitable for use as fuel in an internal combustion engine. The term "special fuel" shall include products commonly known as natural or casing-head gasoline and shall include gasoline and special fuel for heating any private residential dwelling, building or other premises; but shall not include any petroleum prod-

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at the wholesale level, by distributors, importers and others, *and the use tax on the use or consumption within this state of gasoline or special fuel; terminating certain exemptions and making sales taxable;* defining terms; providing for sales and use tax to be imposed on the basis of specified rate applicable to the average whole sale price, converted and computed on a per gallon basis, and exclusive of state and federal gallonage taxes, with such average wholesale price to not be less than the average wholesale price of gasoline and special fuel specified on the effective date of the bill; requiring computation of use tax liability of motor carriers to be based on such average wholesale price of gasoline and special fuel, as determined by the tax commissioner annually, and providing that in no even shall such price be less than that specified on the effective date of this bill.... (Emphasis added.)

> uct or chemical compound such as alcohol, industrial solvent, heavy furnace oil, lubricant, etc., not commonly used nor practicably suited for use as fuel in an internal combustion engine.

House Bill 1657 also amended the exemption provisions of the consumers sales and use tax laws to remove from the scope of the exemptions gasoline and special fuel. The section 11 -15 -9 (1) exemption for sales of gasoline and special fuel taxable under the gasoline and special fuel excise tax law was repealed. Other exemptions in section 11-15-9 were amended to specifically prohibit their application to gasoline and special fuel. The exemption available to persons engaged in the business of transportation was amended to read:

> (7) Sales of property or services to persons engaged in this state in the business of contracting, manufacturing, *transportation,* transmission, communication or in the production of natural resources: *Provided,* That the exemption herein granted shall apply only to services, machinery, supplies and materials directly used or consumed in the businesses or organizations named above *and shall not apply to purchases of gasoline or special fuel,* . . . W. Va. Code § 11-15-9(7) [1983] (emphasis added).

W. Va. Code § 11-15A-13(a)(2) [1983] imposes use tax on the "use or consumption in this state of gasoline or special fuel purchased outside the state at the rate of five percent of the average wholesale price of such gasoline or special fuel," with a floor or minimum average wholesale price of such gasoline and special fuel being fixed by statute at ninety-seven cents per gallon, W. Va. Code § 11-15A-13(c)(2).

W. Va. Code § 11-15A-13(c)(1) delegates to the Tax Commissioner the duty to annually, on January 1st, "determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered for the preceding period of the first day of July through the thirty-first day of October." During the period of this audit the average wholesale price of gasoline and special

fuel was below the minimum price of ninety-seven cents per gallon prescribed in W. Va. Code § 11-15A-13(c)(2); and the rate of consumers sales and use taxes on gasoline and special fuel was 4.85 cents per gallon. The average wholesale price of gasoline and special fuel has never been determined by the Tax Commissioner to exceed 97 cents per gallon.

The procedure for determining the average wholesale price of gasoline and special fuel is set forth in W. Va. Code § 11-15A-13(c) which reads:

> (c) *Determination of average wholesale price.*
>
> (1) To simplify determining the average wholesale price of all gasoline and special fuel, the tax commissioner shall, effective with the period beginning the first day of the month of the effective date of this section and each first day of January, annually, thereafter, determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered from the preceding period of the first day of July through the thirty-first day of October. Notification of the average wholesale price of gasoline and special fuel shall be given by the tax commissioner at least thirty days in advance of each first day of January, annual period, by filing notices of the average wholesale price in the state register, and by such other means as the tax commissioner deems reasonable: *Provided,* That notice of the average wholesale price of gasoline and special fuel for the first period shall be timely given if filed in the state register on the effective date of this section.
>
> (2) The "average wholesale price" shall mean the single, statewide average per gallon wholesale price, rounded to the third decimal (thousandth of a cent), exclusive of state and federal excise taxes on each gallon of gasoline or diesel fuel, as determined by the tax commissioner from information furnished by distributors of gasoline or special fuel in this state,

> or such other information regarding wholesale selling prices as the tax commissioner may gather, or a combination of such information: *Provided,* That in no event shall the average wholesale price be determined to be less than ninety-seven cents per gallon of gasoline or special fuel.
>
> (3) All actions of the tax commissioner in acquiring data necessary to establish and determine the average wholesale price of gasoline and special fuel, in providing notification of his determination prior to the effective date of any change in rate, and in establishing and determining the average wholesale price of fuel, may be made by the tax commissioner without compliance with the provisions of article three, chapter twenty-nine-a of this code.
>
> (4) In any administrative or court proceeding brought to challenge the average whole price of gasoline and special fuel as determined by the tax commissioner, his determination shall be presumed to be correct and shall not be set aside unless it is clearly erroneous.

As a general rule, consumers sales tax is paid on purchases of tangible personal property in this State from vendors engaging in business in this State. The measure of tax is gross proceeds of sale. Because purchases for resale as tangible personal property are exempt from consumers sales tax, W. Va. Code § 11-15-9 (10) [1981], the tax is generally collected by retailers from their customers. If the purchaser subsequently uses the tangible personal in another State, the purchaser cannot file a claim for refund because the taxable transaction, the sale, took place in this State. The use tax is imposed on tangible personal property used in West Virginia that was purchased from an out-of-state vendor. The measure of tax is generally the purchase price of the property W. Va. Code § 11-15A-2 [1981]. If the tangible personal property is later used outside West Virginia, the taxpayer is not entitled to a refund.

The consumers sales tax on gasoline and special fuel is collected by distributors when they sell gasoline or special fuel to retail dealers or to consumers. Therefore, as a general rule, a purchaser of gasoline or special fuel from a West Virginia retail dealer purchases "tax paid fuel." The retail dealer pays the consumer sales tax when he buys the fuel from his distributor. The purchaser of fuel from a retail dealer is not entitled to a refund of consumers sales tax even if the "tax paid fuel" is actually used or consumed out-of-state. Similarly, if a user imports gasoline or special fuel from out-of-state, the user is subject to use tax as provided in W. Va. Code § 11-15A-13(a)(2), subject to the allowance of any credit against the use tax allowed under W. Va. Code § 11-l0A-8 (repealed July 1, 1985) or under W. Va. Code § 11-15A-l0a (effective July 23, 1986 and applicable to claims filed after August 31, 1986 for gasoline or special fuel purchased after June 30, 1985.)

The Legislature recognized the unfairness of the previously described general rules if they applied to interstate motor carriers. Therefore, a special rule is provided in W. Va. Code § 11-15A-13(d) for determining the consumers sales and use taxes owed by interstate motor carriers. The effect of this special rule is that interstate motor carriers pay West Virginia consumers sales and use taxes only on the gallons of gasoline or special fuel which they consumed in the operation of a motor carrier in this State, regardless of where the fuel is purchased. This gallonage is determined by multiplying the motor carrier's consumption of fuel during the reporting period by the ratio which total miles traveled in West Virginia during the reporting period bears to total miles traveled everywhere during the reporting period. The gallonage apportioned to West Virginia is then multiplied by the rate of consumers sales and use tax per gallon, 4.85 cents per gallon since April 1, 1983, to determine the West Virginia tax liability with respect to such gallonage. If the number of gallons of "tax paid" gasoline and special fuel which the motor carrier purchased in West Virginia exceeds the number of gallons of fuel consumed in this State, the motor carrier is refunded (or credit is established for) the amount of tax overpaid. If, however, the

number of gallons of fuel consumed in this State is greater than the number of gallons of "tax paid" fuel purchased in this State, use tax is owed on the additional gallons.

W. Va. Code § 11-15A-13(d) reads:

> (d) *Computation of tax due from motor carriers.* -- Every person who operates or causes to be operated a motor carrier in this state shall pay the tax imposed by this section on the average wholesale price of all gallons of gasoline or special fuel used in the operation of any motor carrier within this state, under the following rules:
>
> (1) The total amount of gasoline or special fuel used in the operation of the motor carrier within this state shall be that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations with and without this state, that the total number of miles traveled within this state bears to the total number of miles traveled within and without this state.
>
> (2) A motor carrier shall first determine the gross amount of tax due under this section on the average wholesale value, determined under subsection (c), of all gasoline and special fuel used in the operation of the motor carrier within this state during the preceding quarter, as if all gasoline and special fuel had been purchased outside this state.
>
> (3) Next, the taxpayer shall determine the total tax paid under article fifteen of this chapter on all gasoline and special fuel purchased in this state for use in the operation of the motor carrier.
>
> (4) The difference between (2) and (3) is the amount of tax due under this article when (2) is greater than (3), or the amount to be refunded or credited to the motor carrier when (3) is greater than (2), which refund or credit shall be allowed in the same manner and under the same conditions as a refund or credit

is allowed for the tax imposed by article fourteen-a of this chapter.

The boundary of West Virginia along the Ohio River is the low water mark on the western side of the Ohio River as it existed in 1787. The Ohio River has been improved since 1787 through the construction of locks and dams and by the dredging of channels. Consequently, Petitioner's watercraft may now navigate West of the 1787 low water mark. Petitioner and the State Tax Department agreed during the audit to a 15% deduction or allowance to compensate Petitioner for the mileage traveled in the State of Ohio between River Mile Marker 40.05 and River Mile Marker 317.1.

The United States Government has sole responsibility for the regulation, servicing and maintenance of the inland navigable waterways system, of which the Ohio River is a part. Article 1, section 8 and article 3, section 2 of the United States Constitution; Title 33 U.S.C. § 1 *et seq.;* Title 49 U.S.C. § 1 *et seq.* However, West Virginia retains jurisdiction over the Ohio River to the extent its authority has not been pre-empted by federal law and to the extent federal law allows states to exercise authority with respect to a river that is part of the inland navigable waterways system.

In 1984, Petitioner and other members of the Waterways Association of Pittsburgh instituted a declaratory judgment proceeding in the Circuit Court of Kanawha County challenging the validity of West Virginia's use tax on gasoline and special fuel. By opinion and order entered on April 18, 1986 in (Civil Action No. 84-C-2184) the Circuit Court held that because a reciprocal credit statute, W. Va. Code § 11-10A-8 [1981], contained in the Multistate Tax Compact was repealed July 1, 1985, W. Va. Code § 11-15A-13 discriminated against interstate commerce and was unconstitutional and without effect after June 30, 1985, because after that date there was no credit available to taxpayers for sales tax paid on out-of-state purchases. The Circuit Court further ordered the Tax Commissioner to "refrain from collecting or attempting to collect

any use taxes which might otherwise be due and owing under West Virginia's Code 11-15A-13."

During the Second Extraordinary Session of 1986, the West Virginia Legislature enacted Com. Sub. for S.B. 1 ("Senate Bill 1"), 1986 W. Va. Acts, Second Extraordinary Session, chapt. 6, which was made effective from its passage on July 23, 1986. Senate Bill 1 amended the use tax law by adding a new section 11-15A-l0a[9], which allows as a credit against West Virginia use tax a sales or compensating use tax paid by the user to the state in which purchase of the tangible personal property occurs. This new section applies to claims for refund or credit of use tax filed after August 31, 1986, for taxable purchases made on or after July 1, 1985. The purpose of this new section was to cure the discrimination found by the Circuit Court of Kanawha County in *Waterways Association of Pittsburgh v. Rose, supra.*

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[9] W. Va. Code § 11-15A-l0a reads:

> (a) A person is entitled to a credit against the tax imposed by this article on the use of a particular item of tangible personal property equal to the amount, if any, of sales tax lawfully paid to another state for the acquisition of that property: *Provided,* That the amount of credit allowed shall not exceed the amount of use tax imposed on the use of the property in this state.
>
> (b) For purposes of this section:
>
> (1) "Sales tax" includes a sales tax or compensating use tax imposed on the use of tangible personal property by the state in which the sale occurred; and
>
> (2) "State" includes the District of Columbia but does not include any of the several territories organized by Congress.
>
> (c) This section shall apply to claims of refund or credit of use tax filed after the thirty-first day of August, one thousand nine hundred eight-six, for taxable purchases made on or after the first day of July, one thousand nine hundred eighty-five, that were legally subject to a sales tax or compensating use tax paid in another state and then also taxed under this article.

Senate Bill 1 also amended and reenacted W. Va. Code § 11-15A-13 by adding a new subsection (j). The purpose of this new subsection was to validate section 11-15A-13 for periods beginning July 1, 1985 and thereafter. W. Va. Code § 11-l5A-13(j) reads:

> *Validation.* -- Inasmuch as there is currently litigation challenging the lawfulness of this section in the situation where a motor carrier purchases gasoline or special fuel in another state paying to that other state a sales tax thereon and then consumes that gasoline or special fuel in its operation of a motor carrier in this state, without being statutorily allowed a credit for such sales tax against the tax imposed by this article with respect to such gallonage of tax paid fuel consumed in this state; and inasmuch as section ten-a of this article reestablished the allowance of such a credit and makes such allowance effectively retroactive and applicable to gasoline and special fuel consumed in this state after the thirtieth day of June, one thousand nine hundred eighty-five, the purported constitutional infirmity is cured. To avoid any question about whether this section was in effect subsequent to the thirtieth day of June, one thousand nine hundred eight-five, this section is reenacted and expressly made retroactive to the first day of July, one thousand eighty-five, and the tax commissioner shall not refund or credit any tax previously paid under this section due to a claim that the tax was not lawfully imposed subsequent to the thirtieth day of June, one thousand nine hundred eighty-five.

Petitioner's R & W Marine Division is engaged in the business of towing barges transporting products in interstate commerce on the Ohio, Tennessee and Mississippi Rivers during the period January 1, 1985 through December 31, 1987, the period covered by this assessment. All of Petitioner's towboats use diesel fuel in the propulsion systems.

Diesel fuel is "special fuel subject to the consumers sales and use taxes.[10]

The amount of diesel fuel used and consumed by Petitioner's watercraft increases as the size and weight of the vessel and the number of barges in the tow increases. It logically follows that other factors, such as the weight of the product or products being transported, whether the watercraft is heading up-stream or down-stream, and weather conditions will also effect fuel consumption.

Petitioner pays a federal fuel excise tax of 10 cents per gallon of diesel fuel which its watercraft consume. 26 U. S. C. § 4042. (Prior to October 1, 1985 the rate of tax was 8 cents per gallon.) The proceeds from the federal fuel use tax are dedicated to the maintenance, improvement and operation of the inland and intercostal waterways. 33 U. S. C. § 1802. The federal excise tax is not allowed as a credit against Petitioner's liability for West Virginia consumers sales and use taxes on diesel fuel it consumed in West Virginia.

Issue

The primary issue is whether West Virginia may lawfully impose and collect use tax on diesel fuel Petitioner consumed during the period April 1, 1986 through September 30, 1986 in the operation of Petitioner's tow boats in West Virginia on the Ohio River between River Mile Marker 40.05 and River Mile Marker 317.1. Petitioner makes a number of arguments in support of setting aside this assessment. These will each be discussed.

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[10] W. Va. Code § 11-15-18(c)(9) reads in relevant part:

> (a) "Special fuel" shall mean and include any gas or liquid, other than gasoline, used or suitable for use as fuel in an internal combustion engine.

Discussion

In deciding this matter, we are guided by the following principles. First, enactments of the Legislature are presumed to be Constitutional, *Haden v. Calco Awning and Window Corp.*, 153 W.Va. 524, 170 S.D. 2d 362 (1969). Second, executive branch agencies do not have the power to determine the constitutionality of a statute it administers in the absence of express statutory authorization. *Simpson v. Laprade,* 248 F. Supp. 399. Third, statutes imposing taxes are strictly construed against the taxing authority, *Batton Coal Co. v. Battle,* 151 W.Va. 519, 153 S. E. 2d 522 (1967), while exemptions from tax are strictly construed against the person claiming exemption from tax, *Woodell v. Dailey,* 160 W.Va. 65, 230 S.Ed. 2d 466 (1976). Fourth, W. Va. Code § 11-15A-13(h) contains the following rule of construction:

> The tax imposed by this article on the use of gasoline or special fuel in this State shall not be construed as taxing any gasoline or special fuel which the State is prohibited from taxing under the constitution of this state or the constitution or laws of the United States.

A. Whether This Assessment Conflicts with the Circuit Court's Order in *Waterways Association of Pittsburgh v. Rose.*

Petitioner's first argument is that in making this assessment the Tax Commissioner violated the final order of the Circuit Court of Kanawha County *in Waterways Association of Pittsburgh v. Rose, supra* which states that the Tax Commissioner "shall refrain from collecting or attempting to collect any use taxes which might otherwise be due and owing under W. Va. Code § 11-15A-13 [1983]."

Petitioner suggests that enactment of new section 11-15A-10a as part of Senate Bill 1 on July 23, 1986 is insufficient to supersede the decision of the Circuit Court of Kanawha County because it only addresses claims for refund or credit

of use tax and is silent as to its application in the case of assessments.

The flaw in Petitioner's argument is the assumption that the sole legislative response to *Waterways Association of Pittsburgh v. Rose,* was enactment of W. Va. Code § 11-15A-l0a (credit for sales tax liability paid to another state).

In point of fact, the Legislature, in Senate Bill 1, amended and reenacted W. Va. Code § 11-15A-13, making the amendment and reenactment retroactive to July 1, 1985. The language of the amendment to section 11-15A-13 provides:

> (j) *Validation.* -- Inasmuch as there is currently litigation challenging the lawfulness of this section in the situation where a motor carrier purchases gasoline or special fuel in another state paying to that other state a sales tax thereon and then consumes that gasoline or special fuel in its operation of a motor carrier in this state, without being statutorily allowed a credit for such sales tax against the tax imposed by this article with respect to such gallonage of tax paid fuel consumed in this state; and inasmuch as section ten-a of this article reestablishes the allowance of such a credit and makes such allowance effectively retroactive and applicable to gasoline and special fuel consumed in this state after the thirtieth day of June, one thousand nine hundred eight-five, the purported constitutional infirmity is cured. *To avoid any question about whether this section was in effect subsequent to the thirtieth day of June, one thousand nine hundred eighty-five, this section is reenacted and expressly made retroactive to the first day of July, one thousand nine hundred eighty-five,* and the tax commissioner shall not refund or credit any tax previously paid under this section due to a claim that the tax was not lawfully imposed subsequent to the thirtieth day of June, one thousand nine hundred eighty-five. (Emphasis added.)

The Tax Commissioner's authority to issue use tax assessments is found in W. Va. Code § 11-10-7 (assessment) [1986]. *See* W. Va. Code § 11-15A-28 (general procedure and administration) [1978]. By expressly reenacting section 11-15A-13 which imposes the use tax on gasoline and special fuel and making the reenactment retroactive to July 1, 1985, the Legislature clearly intended for unpaid use taxes to be assessed and collected on gasoline and special fuel used in West Virginia after June 30, 1985.

The assessment here was issued May 31, 1988 and is for use tax due under W. Va. Code § 11-15A-13 as amended and reenacted in Senate Bill 1 on July 23, 1986. The assessment was not issued for taxes imposed by W. Va. Code § 11 -15A-13 [1983] after it was declared unconstitutional by the Circuit Court of Kanawha County. Therefore, the Tax Commissioner has not violated the Circuit Court's order as Petitioner contends.

A state's authority to not refund an unconstitutional tax and to assess other taxpayers so that all taxpayers are treated alike was recently discussed by the United States Supreme Court:

> [A] State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination. The State may reformulate and enforce the unconstitutional tax during the contested tax period in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause. Having done so, the State may retain the tax appropriately levied upon petitioner pursuant to this reformatted scheme because this retention would deprive petitioner of its property pursuant to a tax scheme that is valid under the Commerce Clause." *McKesson v. Division of Alcoholic Beverages,* 495 U.S. ___, 110 L. Ed. 2d 17, 38 , 110 S.Ct. ___ (1990).

B. Whether The Federal Government's Jurisdiction of Navigable Waterways Pre-empts Imposition of this Tax.

We next address the question whether federal law pre-empts imposition of West Virginia's compensating use tax on diesel fuel which Petitioner's towboats consume operating on the Ohio River within the boundaries of the State of West Virginia.

Petitioner argues that since the adoption of the United States Constitution the Federal Government has pre-empted the creation, maintenance, improvement and regulation of the inland waterways such as the Ohio River. In this same vein, Petitioner argues that enactment of 26 U. S. C. § 4042, which imposes a federal excise tax on inland waterways fuel, pre-empts the authority of this State to impose a tax on fuel used and consumed in Petitioner's watercraft operating on the Ohio River; and that imposition of the state tax creates an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Petitioner acknowledges that the federal pre-emption principle does not prohibit state and local revenue measures that operate only to compensate for benefits actually supplied, *Massachusetts v. United States,* 435 U. S. 444 (1978), but asserts that this exception does not apply to the West Virginia use tax on gasoline and special fuel because it does not operate to compensate the State for benefits its supplies to watercraft plying the Ohio River.

"[S]tate law is not pre-empted whenever there is any federal regulation of an activity or industry or area of law. The Supremacy Clause, among other things, confirms that when Congress legislates within the scope of its constitutionally granted powers, that legislation may displace state law, and this Court has throughout the years employed various verbal formulations in identifying numerous varieties of pre-emption. See, e. g. *Louisiana Public Service Comm'n v. F.C.C.,* 476 U.S. 355, 368-369, 90 L.Ed 2d 369, 106 S.Ct. 1890 (1986). But we have consistently emphasized that the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law

is to be pre-empted, and where there is no actual conflict between what federal law and state law prescribe, we have required that there be evidence of a congressional intent to preempt the specific field covered by state law. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n.*, 461, U. S. 190, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 78 L. Ed. 2d 443, 104 S.Ct. 615 (1984)." *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 6a, 91 L. Ed 2d 1, 106 S.Ct. 2369.

Petitioner has cited no federal statute which prohibits states from imposing a consumers sales and use tax on gasoline and special fuel used in watercraft operating on the inland waterway system. Mere imposition of a federal excise tax on fuel consumed in watercraft on inland waterways is insufficient to prohibit imposition of a state consumers sales and use tax on such fuel.

Moreover, West Virginia retains jurisdiction over the Ohio River to the extent that its authority has not been pre-empted by federal law and to the extent federal law allows states to exercise authority with respect to a river that is part of the inland waterway system. To illustrate, West Virginia may make improvements to a river that is part of the inland waterway system after such improvements are approved by the federal government.

Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 prohibits unreasonable obstructions to navigational capacity, and in those instances specifically enumerated in the second and third clauses, the statute directs the Secretary of the Army, acting upon the recommendation of the Chief of Engineers, to determine what constitutes an unreasonable obstruction. *Wisconsin v. Illinois*, 278 U.S. 367, 413, 73 L. Ed. 426, 49 S.Ct. 163 (1929); *Sierra Club v. Andrus*, 610 F.2d 581, 590 (9th Cir. 1980). Activities affecting the navigational capacity of navigable waters of the United States are matters of federal, not state law. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 201, 19 L. Ed. 2d

407, 88 S.Ct. 379 (1967); *Sierra Club v. Andrus, supra,* at 591. And, any structures or activities listed in Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, are presumed to constitute obstructions and trigger the permit requirements of that Section.

West Virginia has the power to regulate intrastate transportation by water carriers, 49 U.S.C. § 10541(c)(2); and under 49 U.S.C. § 10544 West Virginia has jurisdiction over vessels having a carrying capacity of not more than 100 ton, vessels carrying only passengers which have a passenger limit of 16 persons or less, and ferryboats. West Virginia has other powers which may be exercised as long as state law does not contravene federal law or the state create an obstacle to navigation.

We conclude that West Virginia is not pre-empted from assessing use tax on fuel Petitioner consumes in West Virginia.

C. Whether the Tax Imposed by W. Va. Code § 11-15A-14 is an Unconstitutional Burden on Interstate Commerce in Violation of the Commerce Clause and the Due Process Clause of the United States Constitution.

In *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977), the United States Supreme Court indicated that a state tax will be sustained under the Commerce Clause when (1) the tax is applied to activities having substantial nexus with the state, (2) the tax is fairly apportioned, (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly related to the services provided by the state. This four-part test was adopted by the West Virginia Supreme Court of Appeals in *Virginia Foods of Bluefield, Va., Inc. v. Dailey,* 161 W.Va. 94, 239 S.E. 2d 770 (1977). *See also J.C. Penney Co. v. Hardesty,* 164 W.Va. 525, 264 S.E. 2d 604 (1979); *Union Barge Line v. Hardesty,* W.Va., 282 S.E. 2d 240 (1981).

Petitioner concedes that the first two parts of the *Complete Auto Transit* test are satisfied here but argues that the tax fails

both the "discrimination" test and the "fairly related to services provided" test. If Petitioner is correct, then assessment of the use tax against Petitioner flunks the *Complete Auto Transit* test and must be set aside.

Petitioner cites the following cases for the proposition that where a taxable moment exists, a local event separate and apart from interstate commerce, an excise tax on gasoline or diesel fuel will be upheld. *Nashville, Chattanooga & St. Louis Railway v. Wallace,* 288 U.S. 249 (1933) (Tennessee tax on the privilege of selling, storing or distributing gasoline upheld because incident of the tax occurred when the gasoline came to rest in storage); *Eastern Air Transport, Inc. v. South Carolina Tax Commission,* 285 U.S. 147 (1932) (incident of tax was on sale of gasoline within the State); *Edelman v. Boeing Air Transport, Inc.,* 289 U.S. 249 (1933) (tax applied upon withdrawal of fuel from storage).

Petitioner also cites two cases in which a use tax on fuel was not upheld because the court could find no taxable moment. In *Helson & Randolph v. Kentucky,* 279 U. S. 245, 73 L. Ed. 683, 49 S. Ct. 279 (1929), Kentucky sought to impose a tax upon that portion of fuel consumed in Kentucky by a ferryboat traveling between Illinois and Kentucky. While the fuel was purchased in Illinois, 75 percent of it was consumed in Kentucky making the interstate journey. The United States Supreme Court invalidated the tax, holding that the "tax is exacted as the price of the privilege of using an instrumentality of interstate commerce." *Id.* at 252.

In *Bingaman v. Golden Eagle Western Lines,* 297 U.S. 626 (1936), the United States Supreme Court held that an excise tax on the use of motor fuel purchased in another state and brought from another state and used only in an interstate bus transportation business was invalid as imposing a direct burden on an instrumentality of interstate commerce. The state argued that the tax was compensation for use of its highways. However, the New Mexico Supreme Court had previously reviewed the statute and found it to be a general excise tax on the use of gasoline in the state even though the proceeds of

the tax were devoted to the building and improvement of state highways. The United States Supreme Court found that this did not alter the fact that the tax was not enacted for the privilege of using the highways.

Helson was reaffirmed by the United States Supreme Court in *United Airlines v. Mahin,* 410 U.S. 623 (1973). In that case the Court upheld a use tax on fuel stored at an airport and loaded on airplanes for consumption in interstate commerce. The Court recognized that "fuel cannot be taxed by ... the State in which it is merely consumed." 410 U. S., at 630. The Court utilized a "local event" analysis to sustain the Illinois tax.

> Multiple taxation and tax windfalls are avoided because only one State -- the State of storage before loading -- has a local event under which the tax is imposed. Under *Helson,* States over which the planes fly will be unable to impose a tax on mere consumption. 410 U.S., at 631.62

The problem with all of these cases in that they were decided by the United States Supreme Court Supreme Court prior to its decision in *Complete Auto Transit, Inc. v. Brady, supra.*

In *Washington Revenue Dept. v. Assoc. of Wash. Stevedoring Cos.,* 435 U. S. 734, 750, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978), the Court affirmed that the United States Constitution confers no immunity from state taxation, and that interstate commerce must bear its fair share of the state tax burden. "Instrumentalities of interstate commerce are no exception to this rule, and the Court has regularly sustained property taxes as applied to various forms of transportation equipment. See *Pullman's Palace, supra* (railroad rolling stock); *Ott, supra* (barges on inland waterways); *Braniff, supra* (domestic aircraft). Cf. *Central Greyhound Lines v. Mealey,* 334 U.S. 653, 663, 92 L. Ed. 1033, 68 S.Ct. 1260 (1948) (motor vehicles)." *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S., 434, 444, 60 L. Ed. 2d 336, 99 S.Ct. 1813 (1979).

The continued vitality of *Helson & Randolph v. Kentucky, supra,* is questionable in light of *Complete Auto Transit, Inc. v. Brady, supra,* and its progeny.

In *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 69 L. Ed. 2d 884, 101 S.Ct. 2946 (1981), the Montana Supreme Court had upheld the Montana severance tax against a Commerce Clause challenge because severance of coal was a local activity which preceded entry of the coal into interstate commerce, relying on *Heisler v. Thomas Collierey Co.,* 260 U.S. 245, 67 L. Ed. 237, 43 S.Ct. 83 (1922) and its progeny. The Montana Court also sustained the tax using the *Complete Auto Transit* test 453 U.S., at 613-614. On appeal to the United States Supreme Court, the Appellants questioned whether *Heisler's* "mechanical" approach which looks to whether a state tax is levied on goods prior to their entry into interstate commerce still reflects the law. In response the Court wrote:

> We agree that *Heisler's* reasoning has been undermined by more recent cases. The *Heisler* analysis evolved at a time when the Commerce Clause was thought to prohibit the states from imposing any direct tax on interstate commerce. *See, e.g. Helson & Randolph v. Kentucky,* 279 U.S. 245, 250-252, 73 L. Ed. 683, 49 S.Ct. 279 (1929); *Ozark Pipe Line Corp. v. Monier,* 266 U.S. 555, 562, 69 L. Ed. 439, 45 S.Ct. 184 (1925). Consequently, the distinction between intrastate activities and interstate commerce was crucial to protecting the state's taxing power. The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attached only to a "local" or intrastate activity. . . Correspondingly, the Court has rejected the notion that state taxes levied on interstate commerce are per se invalid. *See,* e. g. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.,* 435 U. S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978); *Complete Auto*

> *Transit, Inc. v. Brady, supra.* In reviewing Commerce Clause challenges to state taxes, our goal has instead been to "establish a consistent and rational method of inquiry focusing on "the practical effect of a challenged tax." *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 443, 63 L. Ed. 2d 510, 100 S.Ct. 1223 (1980). See *Moorman Mfg. Co. v. Blair,* 437 U.S. 267, 276-281, 57 L. Ed. 2d 197, 98 S. Ct. 2340 (1978); *Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., supra,* at 743-751, 55 L. Ed. 2d 682, 98 S.Ct. 1388; *Complete Auto Transit, Inc. v. Brady, supra,* at 277-279, 51 L. Ed. 2d 326, 97 S.Ct. 1076. 453 U.S., at 614-616, 69 L. Ed. 2d 884, 101 S.Ct. 2946.

In *Atchison, Topeka & Santa Fe Railway Co. v. Blair,* Iowa, 338 N.W. 2d 338, 347 (1983), a fuel use tax case, the Supreme Court of Iowa wrote:

> "At one time barges in navigable waters were considered immune frame state taxation of fuel by virtue of the Commerce Clause. *Helson & Randolph v. Commonwealth of Kentucky,* 279 U.S. 245, 251, 49 S.Ct. 279, 281, 73 L. Ed. 683, 687 (1929). We believe *Helson* is no longer the law as a result of *Complete Auto Transit, Inc. v. Brady, supra,* 430 U.S. 274, 97 S.Ct. 1076, 51 L. Ed. 2d 326 (1977)."

The test for discrimination used today by the United States Supreme Court is the test of internal consistency. *American Trucking Assns. v. Scheiner,* 483 U.S. 266, 282-283 97 L. Ed. 2d 226, 107 S.Ct. (1987); *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue,* 483 U.S. 232, 247, 97 L. Ed. 2d 199, 107 S.Ct. 2810 (1987); *Armco Inc. v. Hardesty,* 467 U.S. 638, 644-645, 81 L. Ed. 2d 540, 104 S.Ct. 2620 (1984); *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 163, 77 L. Ed. 545, 103 S.Ct. 2933 (1983).

To pass the "internal consistency" test, a state tax must be of a kind that, "if applied by every jurisdiction, there would be no impermissible interference with free trade." *Armco Inc.*

v. Hardesty, supra, at 644, 81 L. Ed. 2d 540, 104 S.Ct. 2620 (1984).

The West Virginia consumers sales and use tax scheme for taxing gasoline and special fuel passes the internal consistency test. Therefore, the use tax assessed against this Petitioner satisfies the third part of the *Complete Auto Transit* test. If every state in which Petitioner does business has the same tax scheme, Petitioner would pay but one sales or use tax measured by the gallons of diesel fuel consumed in its operations in each State. This is due to the W. Va. Code § 11-15A-13(d) computation formula and the W. Va. Code § 11-15A-10a credit.

Petitioner also contends, however, that the use tax assessed fails the fourth part of the *Complete Auto Transit* test.

Here Petitioner's complaint is that the *amount* the State receives in taxes far exceeds the value of the services which the State provides to it. In objecting to the tax on this ground, Petitioner assumes that the consumers sales and use tax on gasoline and special fuel is, in fact, intended to reimburse the State for the cost of specific services furnished to it or to barge towing companies, in general. Alternatively, Petitioner is arguing that a State's power to tax an activity connected to interstate commerce cannot exceed the value of the services specifically provided to the activity. Either way, the premise of Petitioner's argument is invalid just as appellant's arguments in *Commonwealth Edison v. Montana,* 453 U.S., at 620, 69 L. Ed. 2d 884, 101 S.Ct. 2946. Moreover, Petitioner has misunderstood the nature of the inquiry under the fourth prong of the *Complete Auto Transit* test.

The West Virginia consumers sales and use taxes are generally imposed for the general support of government, even though the tax on gasoline and special fuel is deposited in the Road Fund. In this respect, the tax is similar to the New Mexico use tax in *Bingaman v. Golden Eagle Western Lines, supra* cited by Petitioner.

In reviewing Petitioner's contentions, we must put one side those cases in which the United States Supreme Court reviewed challenges to "user" fees or "taxes" that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities or services. *See, e.g. Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.* 405 U.S. 707, 31 L. Ed. 2d 620, 92 S.Ct. 1349 (1972); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 83 L. Ed. 1001, 59 S.Ct. 744 (1939); *Ingels v. Morf*, 300 U. S. 290, 81 L. Ed. 653, 57 S. Ct. 439 (1937). "User taxes," although termed a tax, cannot be tested by standards which generally determine the validity of taxes. *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 190, 75 L. Ed. 953, 51 S.Ct. 380 (1931). Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, the Court has required a showing, based on factual evidence in the record that "the fees charged do not appear to be manifestly disproportionate to the services rendered...." *Clark v. Paul Gray, Inc.*, 306 U.S., at 599, 83 L. Ed. 1001, 59 S.Ct. 744, *Ingels v. Morf.*, 300 U.S. at 296-297, 81 L. Ed. 653, 57 S.Ct. 439.

The United States Supreme Court has consistently held, however, that States have considerable latitude in imposing general revenue taxes. *Commonwealth Edison Co. v. Montana*, 453 U. S., at 622, 69 L. Ed. 2d 884, 101 S. Ct. 2946. It has rejected claims that the Due Process Clause stands as a barrier against taxes that are "unreasonable" or "unduly burdensome." See, e.g. *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 41, L.,Ed. 2d 132, 94 S.Ct. 2291 (1974); *Magnano Co. v. Hamilton*, 292 U.S. 40, 78 L. Ed. 1109, 54 S.Ct. 599 (1934); *Alaska Fish Salting and By-Products Co. v. Smith*, 255 U.S. 49, 65 L. Ed. 489, 41 S.Ct. 219 (1921). Moreover, there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. Instead, the Court's consistent rule has been:

> "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.

"A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safe-guarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government --- that it exists primarily to provide for the common good." *Carmicahel v. Southern Coal and Coke Co.*, 301 U.S. 495, 521-523, 81 L. Ed. 1245, 57 S.Ct. 868, 109 A.L.R. 1327 (1937) (citations and footnote omitted). *See St. Louis & S.W.R. Co. v. Natin*, 277 U.S. 157, 159, 72 L. Ed. 830, 48 S.Ct. 438 (1928); *Thomas v. Gay*, 169 U.S. 264, 280, 42 L. Ed. 740, 18 S. Ct. 340 (1898). "There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce; particularly when the tax is levied on an activity conducted within the State. 'The exploitation by foreign corporations [or consumers] of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations.' *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, 334-335, 84 L. Ed. 304, 60 S.Ct. 273 (1939); See also *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 93 L. Ed. 585, 69 S. Ct. 432 (1949). To accept appellants' apparent suggestion that the Commerce Clause prohibits the States from requiring an activity connected to interstate commerce to contribute to the general cost of providing governmental services, as distinct from those costs attributable to the taxed activity, would place such commerce in a privileged position. But as we recently reiterated, "'[i]t was not the purpose of the

commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.'" *Colonial Pipeline Co. v. Traigle,* 421 U.S. 100, 108, 44 L. Ed. 2d 1, 95 S. Ct. 1538 (195), quoting *Western Live Stock v. Bureau of Revenue* 303 U.S., at 254, 82 L. Ed. 823, 58 S.Ct. 546, 115 A.L.R. 944. The "just share of state tax burden" includes sharing in the cost of providing "police and fire protection, the benefit of a trained work force, and 'the advantage of a civilized society.'", quoting *Japan Line, Ltd. v. County of Los Angeles,* 441 U. S., 434, 445, 60 L. Ed. 2d 336, 99 S.Ct. 1813 (1979). *See Wash. Revenue Dept. v. Association of Washington Stevedoring Cos.,* 435 U.S., at 750-751, 55 L. Ed. 682, 98 S.Ct. 1388; *id.,;* at 764, 55 L. Ed. 2d 682, 98 S.Ct. 1388 (Powell, J., concurring impart and concurring in result); *General Motors Corp. v. Washington,* 377 U.S. 436, 440, 12 L. Ed. 2d 430, 84 S.Ct. 1564 (1964). *Commonwealth Edison Co. v. Montana,* 453 U. S., at 622-623, 69 L. Ed. 2d 884.

When, as here, a general revenue tax does not discriminate against interstate commerce and is apportioned to activities occurring within the State, the State "is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has afforded, to benefits which it has conferred by the fact of being an orderly civilized society." *Wisconsin v. J. C. Penny Co.,* 311 U.S. 435, 444, 85 L. Ed. 267, 61 S.Ct. 246, 130 A.L.R. 1229 (1940); *Commonwealth Edison Co. v. Montana, supra,* at 625, 69 L. Ed. 2d 884, 101 S.Ct. 2946.

The relevant inquiry under the fourth prong of the complete Auto Transit test is not, as appellant suggests, the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is closely connected to the first prong of the *Complete Auto Transit* test. Under this threshold test, the interstate business must have a substantial nexus with the State before any tax may be levied on it. See

National Bellas Hess, Inc. v. Illinois Revenue Dept., 386 U.S. 753, 18 L. Ed. 2d 505, 87 S. Ct. 1389 (1967), Beyond that threshold requirement, the fourth prong of the Complete Auto Transit test imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contract, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a " just share of state tax burden." *Western Live Stock v. Bureau of Revenue*, 303 U. S., at 254, 82 L. Ed. 823, 58 S. Ct. 546, 115 A. L. R. 944. See *National Geographic Society v. California Board of Equalization*, 430 U. S. 551, 51 L. Ed. 2d 631, 97 S. Ct. 1386 (1977); *Standard Pressed Steel Co. v. Washington Revenue Dept.*, 419 U.S. 560,42 L. Ed. 2d 719, 95 S. Ct. 706 (1975). As the Court explained in *Wisconsin v. J. C. Penney Co., supra*, at 446, 85 L. Ed. 267, 61 S.Ct. 246 (emphasis added), "the incidence of the tax *as well as its measure* [must be] tied to the earnings which the State... has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes, was fond of saying, we pay taxes." *Commonwealth Edison Co. v. Montana, 453 U.S., at 625-626, 69 L.Ed. 2d 884, 101 S.Ct. 2946 (footnotes omitted).*

The "operating incidence" of the tax, see *General Motors Corp. v. Washington*, 377 U.S. at 440-441, 12 L. Ed. 2d 430, 84 S.Ct. 1564, is on the consumption of diesel fuel within West Virginia. Because it is measured by the gallons of diesel fuel consumed in this State, the tax is in "proper proportion to Petitioner's activities within this State and, therefore, to Petitioner's "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities. *Id.* at 441, 12 L. Ed. 430, 84 S.Ct. 1564. Cf. *Nippert v. Richmond*, 327 U.S., at 427, 90 L. Ed. 760, 66 S.Ct. 586, 162 A.L.R. 844. *Commonwealth Edison Co. v. Montana*, 453 U.S., at 626, 69 L. Ed. 2d 884, 101 S.Ct. 2946.

When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and 'the advantage of a civilized society.'" *Exxon Corp. v. Wisconsin*

Department of Revenue, 447 U. S. at 228, 65 L. Ed. 2d 66, 100 S.Ct. 109 (1980) quoting *Japan Line, Ltd. v. County of Los Angeles,* 441 U. S., at 445, 60 L. Ed. 2d 336, 99 S. Ct. 1813. *Commonwealth Edison Co. v. Montana,* 453 U.S., at 627, 69 L. Ed. 2d 884, 101 S.Ct. 2946.

Petitioner argues, however, that the fourth prong of the *Complete Auto Transit* test must be construed as requiring a factual inquiry into the relationship between the revenues generated by a tax and costs incurred on account of the taxed activity, in order to provide a mechanism for judicial disapproval under the Commerce Clause of state taxes that are excessive. This assertion demonstrates a misconception about a court's role in cases such as this. The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial resolution. *See Helson & Randolph v. Kentucky,* 279 U.S. 245, 252, 75 L. Ed. 683, 49 S.Ct. 279 (1929); cf. *Pittsburgh v. Alco Parking Corp.,* 417 U.S. 369, 41 L. Ed. 2d 132, 94 S.Ct. 2291 (1974); *Magnano Co. v. Hamilton,* 292 U.S. 40, 78 L. Ed. 1109, 54 S.Ct. 599 (1934). *Commonwealth Edison Co. v. Montana,* 453 U.S., at 627, 628, 69 L. Ed. 2d 884, 101 S.Ct. 2946.

For these reasons, we find that imposition of the use tax in issue does not violate either the Commerce Clause or the Due Process Clause of the United States Constitution.

D. Whether Tax Imposed by W. Va. § 11-15A-13 Constitutes a Duty of Tonnage.

Art. 1, Sec. 10, Clause 3 of the United States Constitution reads in relevant part:

> No State shall, without the consent of Congress, lay any duty of tonnage ....

In *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, 80 L. Ed. 215, S.Ct. (1935), the Court described tonnage duties as follows:

> At the time of the adoption of the Constitution "tonnage" was a well understood commercial term

signifying in America the internal cubic capacity of a vessel. See *Inman S.S. Co. v. Tinker,* 94 U.S. 238, 243, 24 L. Ed. 118, 121. And duties of tonnage and duties on imports were known to commerce as levies upon the privilege of access by vessels or goods to the parts or to the territorial limits of a state and were distinct from fees or charges by authority of a state for services facilitating commerce, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, storage and the like. See *Cooley v. Port Wardens,* 12 How. 299, 314, 13 L. Ed. 996, 1002; *Inman S.S. Co. v. Tinker, supra* (94 U.S. 243, 24 L. Ed. 121).

Hence the prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port, *Southern S.S. Co. v. Portwardens,* 6 Wall. 31, 18 L. Ed. 749, *supra; State Tonnage Tax Cases* (Cox v. Lott), 12 Wall. 204, 20 L. Ed. 370; *Cannon v. New Orleans,* 20 Wall. 577, 22 L. Ed. 417; *Inman SS. Co. v. Tinker,* 94 U. S. 243, 24 L. Ed. 121, *supra;* and see *Huse v. Glover,* 119 U.S. 543, 549, 550, 30 L. Ed. 487, 490, 491, 7 S.Ct. 313. But it does not extend to charges made by state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel, such as pilotage, *Cooley v. Port Wardens,* 12 How. 299, 13 L. Ed. 996, supra, or wharfage, *Keokuk Northern Line Pocket Co. v. Keokuk,* 95 U.S. 80, 24 L. Ed. 377, *supra; Northwestern Union Packet Co. v. St. Ouis,* 100 U.S. 423, 25 L. Ed. 688; *Cincinnati, P.B.S. and P. Packet Co. V. Catlettsburg.,* 105 U.S. 559, 26 L. Ed. 1169; *Parkersburg and Ohio River Transp. Co. v. Parkersburg,* 107 U.S. 691, 27 L. Ed. 584, 2 S.Ct. 732; *Ouachita River Packet Co. v. Aiken,* 121 U.S. 444, 30 L. Ed. 976, 7 S.Ct. 907, 1 Inters. Com. Rep. 379,

> or charges for the use of locks on a navigable river, *Huse v. Glover* 119 U.S. 543, 30 L. Ed. 487, 7 S. Ct. 313, *supra,* or fees for medical inspection, *Morgan's L. & J. K. & S. S. Co. v. Board of Health,* 118, U.S. 455, 30 L. Ed. 237, 6 S.Ct. 1114.

Petitioner's argument that the use tax on gasoline and special fuel is a duty of tonnage parallels its argument that the tax is analogous to a user tax or fee such as that involved in *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.,* 405 U.S. 707 (1972).

As previously pointed out, the statutory definitions of "gasoline" and "special fuel," W. Va. Code § 11-15-18a(c)(4) and (9) are broad and include such products as home heating oil and propane. Moreover, the consumers sales and use taxes on gasoline and special fuel are paid by virtually every consumer of fuel except governmental entities. This includes motor carriers of every description; coal companies using diesel fuel in off road vehicles and in underground mines; manufacturers using as raw materials petroleum feed stock products that meet the definition of special fuel; warehousers operating fork lifts that operate on propane gas, to give but a few examples. Under these circumstances, the West Virginia consumers sales and use taxes on gasoline and special fuel can hardly be viewed as a duty of tonnage.

E. Whether Tax Imposed by W. Va. Code § 11-15A-13 Is Prohibited Under the Terms of the Northwest Ordinance of 1787 or Virginia Compact of 1789.

Petitioner argues that the tax imposed by W. Va. Code § 11-15A-13 is prohibited by the Northwest Ordinance of 1787 and the Virginia Compact of 1789.

In *American Barge Line Co. v. Koontz,* 136 W. Va. 747, 68 S.E. 2d 56 (1951), the West Virginia Supreme Court held that the Northwest Ordinance and the Virginia Compact did not limit the sovereignty of West Virginia. Citing *Economy Light & Power Co. v. United States,* 256 U.S. 113, 69 L. Ed. 847, 41 S.Ct. 409 (1920), the Supreme Court of Appeals found that

the power of the State is plenary unless and until Congress intervenes.

In *Waterways Association of Pittsburgh v. Rose, supra,* the Circuit Court of Kanawha County found that the use tax imposed by W. Va. Code § 11-15A-13 does not violate the Northwest Ordinance of the Virginia Compact, citing *Streckfus Steamers v. Fox,* 14 F. Supp. 312 (S.D. W.Va. 1936).

We see no reason to disagree.

F. Whether the W. Va. Code § 11-15A-13(c) Delegation to the Tax Commissioner of the Power to Determine the Average Wholesale Price of Gasoline and Special Fuel, Constitutes an Unlawful Delegation of Legislative Power.

Petitioner argues that W. Va. Code § 11-15A-13(c), which directs the Tax Commissioner to annually determine the "average wholesale price" of gasoline and special fuel, is an unlawful delegation by the Legislature of its power of taxation.

Both the consumers sales tax imposed on gasoline and special and the use tax imposed on gasoline and special fuel are based on the "average wholesale price" of gasoline and special fuel, which is determined annually by the Tax Commissioner. W. Va. Code § 11-15-18(b) and § 11-15A-13(a).

The term "average wholesale price" is defined in W. Va. Code § 11-15A-13(c)(2) as follows:

> "The average wholesale price" shall mean the single, state-wide average per gallon wholesale price, rounded to the third decimal (thousandth of a cent) exclusive of state and federal excise taxes on each gallon of gasoline or diesel fuel, as determined by the tax commissioner form information furnished by distributors of gasoline or special fuel in this state, or such other information regarding wholesale selling prices as the tax commissioner may gather, or a combination of such information: *Provided,* That in no event shall the average wholesale price

be determined to be less than ninety-seven cents per gallon of gasoline or special fuel.

The methodology for determining the "average wholesale price" is also set forth in W. Va. Code § 11-15A-13(c) (determination of average wholesale price). Paragraphs 11-15A-13(c)(1), (3) and (4) read:

(c) *Determination of average wholesale price.*

(1) To simplify determining the average wholesale price of all gasoline and special fuel, the tax commissioner shall, effective with the period beginning the first day of the month of the effective date of this section and each first day of January, annually, thereafter, determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered from the preceding period of the first day of July through the thirty-first day of October. Notification of the average wholesale price of gasoline and special fuel shall be given by the tax commissioner at least thirty days in advance of each first day of January, annual period, by filing notices of the average wholesale price in the state register, and by such other means as the tax commissioner deems reasonable: *Provided,* That notice of the average wholesale price of gasoline and special fuel for the first period shall be timely given if filed in the state register on the effective date of this section.

(2) The "average wholesale price" shall mean the single, statewide average per gallon wholesale price, rounded to the third decimal (thousandth of a cent), exclusive of state and federal excise taxes on each gallon of gasoline or diesel fuel, as determined by the tax commissioner from information furnished by distributors of gasoline or special fuel in this state, or such other information regarding wholesale selling prices as the tax commissioner may gather, or a combination of such information: *Provided,* That in

> no event shall the average wholesale price be determined to be less than ninety-seven cents per gallon of gasoline or special fuel.
>
> (4) In any administrative or court proceeding brought to challenge the average whole price of gasoline and special fuel as determined by the tax commissioner, his determination shall be presumed to be correct and shall not be set aside unless it is clearly erroneous.

Article V, Section 1 of the West Virginia Constitution states:

> The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; ....

The cases cited by Petitioner provide the general rules for application of this Constitutional rule. Our concern is how are those rules applied in practice. We believe the following three cases are instructive.

In *State ex rel. Dept of Employment Security v. Manchin*, W.Va., 361 S.E. 2d 474 (1987), respondent asserted that W. Va. Code § 21A-8A-8 [1987] unconstitutionally delegates to the Commissioner of Employment Security authority to establish tax rates upon employers and employees "at a level sufficient to generate the revenues to retire the bonds or notes issued pursuant to this article and to pay deferred interest owed to the federal government when due, subject only to the limitation established in the proceedings [sic] subsection (a) of this section." 361 S.E. 2d, at 482. In upholding the delegation of authority the court wrote "if the Commissioner abuses his statutory discretion and either over or under assesses employers and employees, any member of the affected class can challenge such abuse of discretion in court, where judges can quickly determine from the standards established by the Debt Fund Act' whether there has been an abuse of discretion. For that reason we find no constitutional infirmity in the Act

because of its delegation of authority to establish assessment rates in the Commissioner of Employment Security." 361 S.E. 2d, at 482.

In *State ex rel. Raese v. Battle,* 149 W.Va. 761, 143 S.E. 2d 328 (1965), the Supreme Court held that because the Legislature failed to specify how the state tax commissioner may proceed to carry out certain duties imposed on him by W. Va. Code § 18-9A-4 [now § 18-9A-11] and the court has no power or authority to supply a procedure, the Tax Commissioner was without power to proceed to enforce such provisions. However, almost 15 years later in *Pauley v. Kelley,* W.Va. , 255 S.E. 2d 859 (1979), the Supreme Court held that "[t]o the extent that *State ex rel. Raese v. Battle,* . . . states that the Tax Commissioner is without power to proceed to enforce the provisions of W. Va. Code, 18-9A-11, it is overruled." 255 S.E. 2d at 881-882.

We observe that this issue was also raised in *Waterways Association of Pittsburgh v. Rose, supra,* and decided against the plaintiffs in the proceeding.

We find no reason to disagree.

WHEREFORE, it is the DECISION of Charles O. Lorensen, Tax Commissioner of the State of West Virginia, that the assessment in this matter for use taxes in the amount of $8,608.94 plus statutory interest for the period January 1, 1985 through December 31, 1987 should be and the same is hereby affirmed. Statutory interest will continue to accrue as provided in W. Va. Code § 11-10-17(a) until the tax is paid.

Charles O. Lorensen
State Tax Commissioner

BY: /s/ Dale W. Steager

Dale W. Steager
Special Deputy Tax Commissioner

Issued: August 14, 1990

Appendix F

State of West Virginia Department of Tax and Revenue

Charleston 25305

GASTON CAPERTON
GOVERNOR

L. FREDERICK WILLIAMS, JR.
SECRETARY

State of WEST VIRGINIA, County of KANAWHA: This is to certify that this is a true and correct copy

/s/ Priscilla H. Gay
HEARING EXAMINER, W.VA. STATE TAX DEPARTMENT

Subscribed and sworn before me this 19th day of March, 1992

/s/ Karen L. Light, Notary Public
My Commission Expires 11/5/96

BEFORE THE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA

In the Matter of the Petitions of HARTLEY MARINE CORPORATION 1400 - 580 Building Cincinnati, OH 45202	)))))	ACCOUNTING DIVISION DOCKET NO. 86-781 RU (REASSIGNED DOCKET NO. 86-935 RU) AND 90-5142 RU FILE NO. 31-099-3262-001
PRESIDING HEARING EXAMINER:		Randall B. Suter
PETITIONER REPRESENTED BY:		G. Thomas Battle, Esquire

ACCOUNTING DIVISION REPRESENTED BY:	Robert P. Rodak Asst. Director of Legal Div. and Staff Attorney
DATE, TIME AND PLACE OF HEARING:	February 21, 1991 at 1:15 p.m. DEPARTMENT OF TAX AND REVENUE Charleston, West Virginia

ADMINISTRATIVE DECISION

The matter herein addressed arises as a result of the Petitioner filing two separate claims for refund, which have been consolidated for purposes of hearing and issuance of this Decision.

The first petition is represented by Docket No. 86-781 RU. We note that a letter from the Docket Clerk of this Office, dated December 16, 1986 and addressed to the Petitioner was found in the Office of Hearings and Appeals file whereby the docket number for 86-781 RU was changed to 86-935 RU. However, this reassigned docket number appears to have been entirely ignored by all parties, as well as this Office, and all briefs and documents relating to the matter seem to bear the docket number 86-781 RU, including documents which were generated long subsequent to the date of the aforesaid letter from the Docket Clerk of this Office. Therefore, we shall use 86-781 RU as the applicable docket number for this case.

Hartley Marine Corporation filed a petition on or about October 6, 1986, seeking a refund of gasoline and special fuel use tax paid over the period of April 1, 1983 to April 30, 1986 in the amount of $64,520.50 plus interest. Matters arising out of this petition bear the docket number 86-781 RU.

Hartley Marine Corporation filed a petition on or about October 19, 1990, seeking a refund of gasoline and special fuel use tax paid over the period of July 1, 1986 through March 31, 1990 in the amount of $54,469.14, plus interest.

Matters arising out of this petition bear the docket number 90-5142 RU.

Hartley Marine Corporation submitted amendments to both of its petitions for refund on or about January 10, 1991 setting forth purported additional reasons why the Petitioner's claims for refund should be granted. The petitions were consolidated for hearing, and petitioner was given notice of the date, time and place of the hearing. Randall B. Suter, a Hearing Examiner, determined that all notices had been properly given, and convened the hearing at 1:15 p.m. on February 21, 1991.

Petitioner, Hartley Marine Corporation, is incorporated under the laws of the State of Delaware, and its principal office is located in Cincinnati, Ohio.

On February 18, 1983, the West Virginia Legislature passed House Bill 1657, amending Articles 14, 14A, 15 and 15A of Chapter 11 of the West Virginia Code. House Bill 1657 became effective April 1, 1983, and provides for imposition of a tax on the sale, use or consumption in West Virginia of gasoline or special fuel. In 1986, Article 15A was further amended effective July 23, 1986, by Senate Bill 1, to allow a credit against West Virginia Fuel Use Tax for any sales or compensating use tax paid on fuel purchased outside West Virginia. W. Va. Code § 11-15A-10a. This new section applies to claims for refund or credit of use tax filed after August 31, 1986, for taxable purchases made on or after July 1, 1985. Senate Bill 1 also amended and reenacted W. Va. Code § 11-15A-13 by adding a new subsection (j).

West Virginia Code § 11-15A-13 (a) (2) imposes an excise tax on the "use or consumption in this state of gasoline or special fuel purchased outside this state at the rate of 5% of the average wholesale price of said gasoline or special fuel. A minimum wholesale price for purposes of computation of the tax is fixed by statute at 97 cents per gallon. W. Va. Code § 11-15A-13 (a) (1). Every motor carrier operating in West Virginia is required to pay the excise tax on all gallons of gasoline or special fuel used within the State, except where such tax is prohibited under the West Virginia Constitution or

the Constitution and laws of the United States. W. Va. Code § 11-15A-13 (d).

West Virginia Code § 11-15A-13 (c) (1) mandates that the State Tax Commissioner "determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered for the preceding period of the first day of July through the thirty-first day of October." The average wholesale price is to be determined "from information furnished by distributors of gasoline and special fuel in this state, or such other information regarding wholesale selling price as the tax commissioner may gather, or a combination of such information. . . ." W. Va. Code § 11-15A-13 (c) (2).

The average wholesale price of gasoline and special fuel determined by the State Tax Commissioner as applicable to the entire period at issue in this proceeding, was below the minimum price of 97 cents per gallon. Therefore, the minimum wholesale price prescribed by statute for purposes of computation of the tax, 97 cents, was in effect for the entire period at issue.

The Petitioner is a motor carrier as defined in W. Va. Code § 11-15-18 (c) (6), and at all times since February 18, 1983, has been engaged in the business of transporting products by watercraft in interstate commerce on the Ohio and Mississippi River systems.

The boundary of the State of West Virginia along the Ohio River was established as the low water mark on the west bank of the Ohio River in 1787 by the Northwest Ordinance. That portion of the Ohio River extending east from the low water mark on the west bank as it existed in 1787 lies within and is a part of the State of West Virginia. The Ohio River has been improved since 1787 by the construction of a series of locks and dams and the dredging of channels. The establishment of locks and dams on the Ohio River system has raised the water level of the river, and navigable water now extends west of the low water mark as it existed on the west bank of the Ohio River in 1787. Consequently, watercraft may now navigate on

the Ohio River west of that low water mark of 1787, and in so doing, may travel outside of the boundary of the State of West Virginia while navigating the Ohio River.

The Petitioner's watercraft operate within the State of West Virginia while traveling on the Ohio River between river mile marker 40 and river mile marker 317 while in waters lying east of the low water mark on the west bank of the river as it existed in 1787. The Petitioner's watercraft operate outside of the State of West Virginia while traveling on the Ohio River between river mile marker 40 and river mile marker 317 while in waters lying west of the low water mark of the west bank of the Ohio River as it existed in 1787.

The Petitioner cannot determine precisely when its watercraft are within the State of West Virginia as a result of the improvements and changes along the Ohio River which have occurred since 1787. Based upon information previously presented to the Department of Tax and Revenue, the Petitioner and the Department of Tax and Revenue have agreed to 15% deduction or allowance to compensate for the fact that Petitioner's watercraft operate outside of the boundary of the State of West Virginia while on the Ohio River between river mile markers 40 and 317. The Petitioner took this allowance into account when filing its West Virginia gasoline and special fuel use tax returns.

The United States government has responsibility for the regulation, servicing and maintenance of the inland navigable waterways system, of which the Ohio River is a part.

The sole means of power for propulsion of the Petitioner's watercraft is gasoline or special fuel as defined in W. Va. Code § 11-15-18 (9). The amount of fuel used and consumed by watercraft operated by Petitioner to transport products on the Ohio River increases as the size and weight of the vessel increases.

The Petitioner has filed Form 720, the quarterly federal excise tax return, with the United States Internal Revenue Service, and the Petitioner pays a fuel use tax pursuant to

Section 4042 of the Internal Revenue Code, Title 726 USC, on the same fuel subject to the fuel use tax imposed by the State of West Virginia. The total amount of such federal fuel use tax paid by the Petitioner on fuel used in West Virginia by the Petitioner for the periods at issue are as follows:

Tax Period	Amount
April 1, 1983 through April 30, 1986	$ 92,287
July 1, 1986 through March 31, 1990	$111,282

The State of West Virginia allows no credit for taxes paid to the United States government, Internal Revenue Service, for fuel consumed by the Petitioner's watercraft used in connection with its river transportation business. The denial of Petitioner's claim for refund has resulted in the tax imposed by W. Va. Code § 11-15A-13 (a) being paid with respect to all gasoline and special fuel used and consumed by the Petitioner's watercraft operating in West Virginia waters. The Petitioner has filed returns as required under the provisions of House Bill 1657 and has paid tax, under protest, on fuel consumed in its watercraft on the Ohio River between river mile marker 40 and river mile marker 317. The Petitioner has never sought to apply any credit against the tax imposed by W. Va. Code § 11-15A-13, for sales tax paid in another state because it has paid no sales tax to another state on fuel consumed in West Virginia.

Petitioner's business activities in West Virginia include the operation of a midstream refueling facility at Point Pleasant, West Virginia, and a barge towing business through its operating division, R & W Marine, which operates on the Ohio, Tennessee and Mississippi Rivers. Petitioner maintains an office, bulk fuel storage barges and small tow boat at Point Pleasant, West Virginia. There is a parking lot for the Petitioner's employees at the Point Pleasant facility. Most refuelings are done at midstream, however, there are occasional dockside refuelings. Petitioner's towing business in West Virginia consisted of one point, two point and pass-through traffic during the audit period. The Petitioner operates a repair facility (Walker Boat Yard), fleeting service (Walker Barge

Fleeting Service) and midstream fueling service (Walker Midstream Fuel and Service) at Paducah, Kentucky. In the event of a medical emergency, Petitioner's employees could make use of West Virginia medical facilities depending on how close such employees are to such facilities at the time a medical emergency arises.

ISSUES

The issues to be decided in the matters here in controversy are:

1. Constitutional commerce clause and due process questions:

a. Is the tax here in controversy a direct burden on an instrumentality of interstate commerce in violation of Article 1, Section 8, Clause 3 of the United States Constitution, the Commerce Clause?

b. Does the tax here in controversy fail to bear any fair relationship to the benefits received by the Petitioner from the State of West Virginia in such a way as to cause the said tax to be unconstitutional?

c. Is the tax here in controversy an unconstitutional burden on interstate commerce in violation of the Commerce Clause and the Due Process Clause of the United States Constitution because the tax is not fairly related to services provided to the Petitioner by the State of West Virginia?

d. Does the tax here in controversy impose a charge on watercraft operating on the navigable waters of the State of West Virginia without corresponding benefit to the Petitioner in such a way that such tax constitutes a duty of tonnage prohibited by Article 1, Section 10 of the United States Constitution.

e. Is the activity of the Taxpayer such that there exists insufficient nexus with the State of West Virginia so as to cause imposition of the tax here in controversy to constitute an unconstitutional burden on interstate commerce in violation of

the Commerce Clause and Due Process Clause of the United States Constitution?

f. Is application of the tax here in controversy unconstitutional in violation of the Commerce Clause and Due Process Clause because the imposition of such tax was ruled improper by the State Tax Commissioner in Administrative Decision 86-937 RU.

g. Does the tax here in controversy discriminate against interstate commerce in violation of the Commerce Clause and Due Process Clause of the United States Constitution because the statute imposing such tax prior to June 30, 1985, allowed a credit against the tax with respect to tax paid on fuel purchased in the State of West Virginia, but allowed no similar credit for tax that was or could be imposed by other jurisdictions on fuel purchased outside the State of West Virginia.

2. Is the delegation of authority to the Tax Commissioner set forth in W. Va. Code § 11-15A-13 to determine the average wholesale price of gasoline and special fuel an unlawful delegation of the taxing power of the Legislature in violation of Article 5, Section 1 of the West Virginia Constitution?

3. Is the tax here in controversy invalid as violating the spirit or terms of the Northwest Ordinance and the Virginia Compact, which declare navigable waters forever free?

4. Is the tax here in controversy unlawful and void by reason of the fact that jurisdiction to improve, maintain, regulate and tax navigable waterways has been preempted by the United States government?

5. Is the tax invalid in accordance with the holding of the Kanawha County Circuit Court in the case of *Waterways Association of Pittsburgh v. Rose* (Civil Action No. 84-C-2814, Kanawha County, April 18, 1986), particularly with respect to tax paid by Petitioner on and after July 1, 1985, because the court, in that case, invalidated the tax after June 30, 1985?

ANALYSIS AND DECISION

The issues here in controversy are substantively identical to the issues decided in an administrative decision issued by this office on October 14, 1990, Docket No. 88-422 G. The Petitioner in that case was the same as the Petitioner in this case, Hartley Marine Corporation.

Given the identity of issues, and given that the same Petitioner was involved in both cases, we will summarize the analyses set forth in Administrative Decision 88-422 G, and refer the Petitioner to that decision for a more detailed and extensive statement of the reasoning and authorities which underlie the decision here rendered.

1. The tax here in controversy meets the requirements of the Commerce Clause and the Due Process Clause of the United States Constitution. The United States Supreme Court adopted a four-part test in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977), for determining whether a tax will be sustained under the Commerce Clause of the United States Constitution. A state tax will be sustained when (1) the tax is applied to activities having substantial nexus with the State, (2) the tax is fairly apportioned, (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly related to the services provided by the State.

There is little argument that the tax is applied to activities having substantial nexus with the State. The record contains an extensive recitation of the Taxpayer's activities in the State of West Virginia. The Petitioner's ownership and operation of facilities and property in the State of West Virginia, the Petitioner's payment of taxes based upon its activities and operations in West Virginia (other than the tax here in controversy) and the Taxpayer's general utilization of the business climate of West Virginia to its advantage are substantial evidence of the Petitioner's nexus with the State. The tax fairly apportioned, and there has been no allegation that the State of West Virginia is attempting to tax the use of fuels in any state other than the State of West Virginia. The taxpayer has agreed to

the 15% allowance for movements of its vessels in the Ohio River west of the state boundary as it existed in 1787 as a fair apportionment of tax with relation to that navigational factor.

The tax does not discriminate against interstate commerce pursuant to the internal consistency test announced by the United Supreme Court in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984). The West Virginia consumers sales and use tax scheme for taxing gasoline and special fuel passes the internal consistency test in that if the tax were applied by every jurisdiction, there would be no impermissible interference with free trade. The Petitioner would pay but one sales or use tax measured by the gallons of fuel consumed in its operations in each state. This is due to the W. Va. Code § 11-15A-13 (d) computation formula and the W. Va. Code § 11-15A-10a credit.

The tax meets the fourth test under the Complete Auto Transit analysis because the West Virginia consumers sales and use taxes are generally imposed for the general support of government, even though the tax on gasoline and special fuel is deposited in the road fund. There is no requirement under the due process laws that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. The United States Supreme Court has consistently held that a tax is not an assessment of benefits. It is a means of distributing the burden of the cost of government. The only benefit to which a taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. *Carmichael v. Southern Coal and Coke Company*, 301 U.S. 495, 81 L. Ed. 1245, 57 S. Ct. 868 (1937). The relevant inquiry under the fourth *Complete Auto Transit* test is not the amount of the tax or the value of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is whether the measure of the tax is reasonably related to the extent of the contact of the taxpayer and the State. The taxpayer enjoys the benefits and protections of the State of West

Virginia in its operation of its facilities and in the exercise of its business privileges in the State of West Virginia. The Petitioner's enjoyment of these opportunities and protections which are afforded by the State are sufficient to sustain the fourth test of the *Complete Auto Transit* analysis.

The Petitioner alleges that the tax here in controversy constitutes a duty of tonnage prohibited by Article 1, Section 10 of the United States Constitution. The United States Supreme Court discussed duties of tonnage in *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 80 L. Ed. 215 (1935). The Court found that the prohibition against tonnage duties embraces all taxes and duties, regardless of their name or form, which operate to impose a charge for the privilege of entering, trading in or lying in a port. Duties of tonnage basically constitute levies upon the privilege of access by vessels or goods to the parts or the territorial limits of a state. Duties of tonnage are distinct from charges or fees imposed by a state or authority for services facilitating commerce, such as pilotage, towing charges, and charges for loading and unloading cargos. The West Virginia consumers sales and service tax and use taxes on gasoline and special fuel are paid by virtually every consumer of fuel except governmental entities. This includes motor carriers of every description. The use tax on gasoline and special fuel is imposed on the use of such fuel in the State of West Virginia. The tax is not a user fee or in any way imposed for the privilege of access by vessels, or for entering into, trading in or or accessing the territory of the State of West Virginia. It is not a duty of tonnage.

The Petitioner cites Administrative Decision 86-937 RGU as supporting the proposition that the tax here in controversy is somehow unconstitutional by reason of the Petitioner's purported lack of substantial nexus with the State of West Virginia. Administrative Decision 86-937 RGU was based upon the fact that the imposition of the tax in that case did not meet the four-part test for lawful imposition of a state tax on a person engaging in interstate commerce set forth in *Complete Auto Transit, Inc. v. Brady, supra*. We have already specifically found and determined that the imposition of the tax

upon the Petitioner in the matters here in controversy specifically meets the requirements of *Complete Auto Transit, Inc. v. Brady*. The four tests announced in that case have all been met by the imposition of tax upon the Petitioner in the matters here in controversy. Administrative Decision 86-937 RGU is not an applicable precedent to support the Petitioner's claim for refund.

2. The Petitioner argues that W. Va. Code § 11-15A-13 (c), which directs the Tax Commissioner to determine the average wholesale price of gasoline and special fuel each year, is an unlawful delegation by the Legislature of its power of taxation.

The term "average wholesale price" is defined in W. Va. Code § 11-15A-13 (c) (2). The methodology for determining the "average wholesale price" is also set forth in W. Va. Code § 11-15A-13 (c). These provisions establish standards whereby the average wholesale price of gasoline and special fuel can be determined. The Tax Commissioner is limited as to the methodology to be employed, but is given certain latitude with relation to the information to be gathered in making the determination.

We observe that this issue was raised in *Waterways Association of Pittsburgh v. Rose*, *supra*, and was decided against the plaintiffs in that proceeding. We find no reason to disagree with the court as to this issue.

3. The tax here in controversy is not prohibited under the terms of the Northwest Ordinance of 1787 nor under the terms of the Virginia Compact of 1789.

In *American Barge Line Company v. Koontz*, 136 W. Va. 747, 68 S.E. 2d 56 (1951), the West Virginia Supreme Court held that the Northwest Ordinance and the Virginia Compact do not limit the sovereignty of the State of West Virginia. In *Waterways Association of Pittsburgh v. Rose*, *supra*, the Circuit Court of Kanawha County found that the use tax imposed by W. Va. Code § 11-15A-13 does not violate the Northwest

Ordinance or the Virginia Compact. We do not disagree with the court's holding on this issue.

4. The Petitioner argues that jurisdiction over navigable waterways has been preempted by the United States government. The fundamental inquiry in any preemption analysis is whether Congress intended to displace state law. Where a congressional statute does not expressly declare that state law is preempted, and where there is no actual conflict between what federal law and state law prescribe, the United States Supreme Court has required that there be evidence of a congressional intent to preempt the specific field covered by state law.

The Petitioner has cited no federal statute which prohibits states from imposing a consumers sales and use tax statute on gasoline and special fuel used in watercraft operating on the inland waterway system. Mere imposition of a federal excise tax on fuel consumed in watercraft on inland waterways is insufficient to prohibit imposition of a state consumers sales and use tax on such fuel. West Virginia retains jurisdiction over the Ohio River to the extent that its authority has not been preempted by federal law and to the extent federal law allows states to exercise authority over a river that is part of the inland waterway system.

West Virginia is not preempted from assessing use tax on the fuel which the Petitioner consumes in West Virginia.

5. The Petitioner claims that the tax discriminates against interstate commerce by reason of the fact that, prior to June 30, 1985, the statute, at that time, allowed a credit against the use tax with respect to tax paid on fuel purchased in the State of West Virginia, but the statute allowed no similar credit for tax imposed by other jurisdictions on fuel purchased outside this state. This claim can be related to the holding of the Kanawha County Circuit Court in *Waterways Association of Pittsburgh v. Rose*, *supra*, wherein the court invalidated the use tax for periods after June 30, 1985.

The Petitioner is essentially asking this Office to apply the *Waterways* decision retroactively to periods prior to June 30, 1985. Absent a judicial mandate to so apply that decision, this Office will not apply the *Waterways* decision retroactively. Therefore, imposition of the said tax for periods prior to June 30, 1985, is constitutional, notwithstanding the failure of the statute to provide for the credit discussed above. For periods subsequent to June 30, 1985, it is our finding that remedial legislation enacted by the Legislature of the State of West Virginia fully cured any constitutional question relating to the imposition of the West Virginia use tax on gasoline and special fuel for periods subsequent to June 30, 1985, and Petitioner's claims of unconstitutionality based upon the holdings of the Kanawha County Circuit Court in *Waterways Association of Pittsburgh v. Rose* have been rendered invalid by remedial legislation.

DECISION

WHEREFORE, it is the DECISION of the State Tax Commissioner that the two petitions for refund in this matter, aggregating to the amount of $123,989.64 are DENIED.

STATE TAX COMMISSIONER

BY: /s/ Priscilla H. Gay
PRISCILLA H. GAY
DIRECTOR

December 30, 1991
DATE RENDERED

Appendix G

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
JO PREAST
1147 BIG CREEK RD.
GAULEY BRIDGE, WV 28085
My Commission Expires
10-31-2000

State of WEST VIRGINIA, County of KANAWHA: This is to certify that this is a true and correct copy

/s/ Priscilla H. Gay

HEARING EXAMINER, W.Va. STATE TAX DEPARTMENT

Subscribed and sworn before me this 2nd day of April, 1992

/s/ Jo Preast
_____, Notary Public

My Commission Expires 10-31-2000

STATE OF WEST VIRGINIA

DEPARTMENT OF TAX AND REVENUE

Charleston 25305

GASTON CAPERTON
GOVERNOR

JAMES H. PAIGE III
SECRETARY

BEFORE THE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA

In the Matter of the Petitions of OHIO RIVER COMPANY 1400-580 Building Cincinnati, OH 45202	)))))	ACCOUNTING DIVISION DOCKET NO. 86-780 RG & NO. 90-5141 RU FILE NO. 31-039-7330-001
PRESIDING HEARING EXAMINER:		Randall B. Suter
PETITIONER REPRESENTED BY:		G. Thomas Battle, Esquire Betty Pullin, Esquire Peter Feichtner, Director of Corporate Taxes Midland Enterprises
ACCOUNTING DIVISION REPRESENTED BY:		Robert P. Rodak Asst. Director of Legal Div. and Staff Attorney
DATE, TIME AND PLACE OF HEARING:		February 21, 1991 at 9:30 a.m. DEPARTMENT OF TAX & REVENUE Office of Hearings and Appeals 1001 Lee Street, East Charleston, West Virginia

ADMINISTRATIVE DECISION

The Petitioner filed two petitions for refund of West Virginia use tax paid. These were filed on or about October 6, 1986, and October 19, 1990. The first petition for refund was for the period of April 1, 1983 through April 30, 1986 for $400,017.89 plus interest, and the second petition was for the period of July 1, 1986, through March 31, 1990, for $662,385.39 plus interest. The two petitions for refund have been consolidated for purposes of hearing and decision. The Petitioner filed amendments to its petitions for refund on or about January 17, 1991, adding two further points of objection to those already on record in support of the petitions for

refund. The petitions for refund both dispute the Petitioner's liability for payment of the gasoline and special fuel use tax imposed by Article 15A, Chapter 11 of the West Virginia Code of 1931, as amended.

Randall B. Suter, a hearing examiner, determined that all notices had been properly given, and convened a hearing of the matter here in controversy at 9:30 a.m., February 21, 1991, at the Department of Tax and Revenue Office of Hearings and Appeals at 1001 Lee Street, East, Charleston, West Virginia.

The Petitioner is a West Virginia corporation, organized in the 1930's, which maintains its principal office in Cincinnati, Ohio. The Petitioner is engaged in transporting products and material by barge in interstate commerce on the Ohio River and other navigable rivers of the inland waterways system. The Petitioner operates a river loading facility at Kenova, West Virginia.

On February 18, 1983, the West Virginia Legislature passed House Bill 1657, amending Articles 14, 14A, 15 and 15A of Chapter 11 of the West Virginia Code. House Bill 1657 became effective April 1, 1983, and provides for imposition of a tax on the sale, use or consumption in West Virginia of gasoline or special fuel. In 1986, Article 15A was further amended effective July 23, 1986, by Senate Bill 1, to allow a credit against West Virginia Fuel Use Tax for any sales or compensating use tax paid on fuel purchased outside West Virginia. W. Va. Code § 11-15A-10a. This new section applies to claims for refund or credit of use tax filed after August 31, 1986, for taxable purchases made on or after July 1, 1985. Senate Bill 1 also amended and reenacted W. Va. Code § 11-15A-13 by adding a new subsection (j).

West Virginia Code § 11-15A-13 (a) (2) imposes an excise tax on the "use or consumption in this state of gasoline or special fuel purchased outside this state at the rate of 5% of the average wholesale price of said gasoline or special fuel. A minimum wholesale price for purposes of computation of the tax is fixed by statute at 97 cents per gallon. W. Va. Code §

11-15A-13 (a) (1). Every motor carrier operating in West Virginia is required to pay the excise tax on all gallons of gasoline or special fuel used within the State, except where such tax is prohibited under the West Virginia Constitution or the Constitution and laws of the United States. W. Va. Code § 11-15A-13 (d).

West Virginia Code § 11-15A-13 (c) (1) mandates that the State Tax Commissioner "determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered for the preceding period of the first day of July through the thirty-first day of October." The average wholesale price is to be determined "from information furnished by distributors of gasoline and special fuel in this state, or such other information regarding wholesale selling price as the tax commissioner may gather, or a combination of such information...." W. Va. Code § 11-15A-13 (c) (2).

The average wholesale price of gasoline and special fuel determined by the State Tax Commissioner as applicable to the entire period at issue in this proceeding, was below the minimum price of 97 cents per gallon. Therefore, the minimum wholesale price prescribed by statute for purposes of computation of the tax, 97 cents, was in effect for the entire period at issue.

The Petitioner's towboats regularly operate on the West Virginia portion of the Ohio River, as well as on parts of the Allegheny and Monongahela Rivers and on other rivers in the Eastern United States.

The boundary of the State of West Virginia along the Ohio River was established as the low water mark on the west bank of the Ohio River in 1787 by the Northwest Ordinance. That portion of the Ohio River extending east from the low water mark on the west bank as it existed in 1787 lies within and is a part of the State of West Virginia. The Ohio River has been improved since 1787 by the construction of a series of locks and dams and the dredging of channels. The establishment of locks and dams on the Ohio River system has raised the water

level of the river, and navigable water now extends west of the low water mark as it existed on the west bank of the Ohio River in 1787. Consequently, watercraft may now navigate on the Ohio River west of that low water mark of 1787, and in so doing, may travel outside of the boundary of the State of West Virginia while navigating the Ohio River.

The Petitioner's watercraft operate within the State of West Virginia while traveling on the Ohio River between river mile marker 40 and river mile marker 317 while in waters lying east of the low water mark on the west bank of the river as it existed in 1787. The Petitioner's watercraft operate outside of the State of West Virginia while traveling on the Ohio River between river mile marker 40 and river mile marker 317 while in waters lying west of the low water mark of the west bank of the Ohio River as it existed in 1787.

The Petitioner cannot determine precisely when its watercraft are within the State of West Virginia as a result of the improvements and changes along the Ohio River which have occurred since 1787. Based upon information previously presented to the Department of Tax and Revenue, the Petitioner and the Department of Tax and Revenue have agreed to a 15% deduction or allowance to compensate for the fact that Petitioner's watercraft operate outside of the boundary of the State of West Virginia while on the Ohio River between river mile markers 40 and 317. The Petitioner took this allowance into account when filing its West Virginia gasoline and special fuel use tax returns.

The United States government has responsibility for the regulation, servicing and maintenance of the inland navigable waterways system, of which the Ohio River is a part.

The sole means of power for propulsion of the Petitioner's watercraft is gasoline or special fuel as defined in W. Va. Code § 11-15-18(9). The amount of fuel used and consumed by watercraft operated by Petitioner to transport products on the Ohio River increases as the size and weight of the vessel increases.

The Petitioner pays a fuel use tax pursuant to Section 4042 of the Internal Revenue Code, Title 26 USC, on the same fuel subject to the fuel use tax imposed by the State of West Virginia. The State of West Virginia allows no credit for taxes paid to the United States government, Internal Revenue Service, for fuel consumed by the Petitioner's watercraft used in connection with its river transportation business. The denial of Petitioner's claim for refund has resulted in the tax imposed by W. Va. Code § 11-15A-13(a) being paid with respect to all gasoline and special fuel used and consumed by the Petitioner's watercraft operating in West Virginia waters. The petitioner has filed returns as required under the provisions of House Bill 1657 and has paid tax, under protest, on fuel consumed in its watercraft on the Ohio River between river mile marker 40 and river mile marker 317 and other West Virginia waters. The Petitioner has never sought to apply any credit against the tax imposed by W. Va. Code § 11-15A-13, for sales tax paid in another state because it has paid no sales tax to another state on fuel consumed in West Virginia.

During the periods for which refunds are sought in the matters here in controversy, the Petitioner engaged in one point, two point and pass-through business in West Virginia. One point traffic occurs when the origin of a transport is in one state and the destination in another. Thus, the Petitioner engaged in transports where either the origin or the destination of the transport was in West Virginia. Two-point traffic occurs where both the origin and the destination of the particular transport is within a single state. Thus, the Petitioner engaged in transports where the origin and the destination of the materials to be moved were both in the State of West Virginia. Pass-through traffic occurs where the origin and destination of the transport do not occur within the particular state being passed through. Thus, the Petitioner engaged in transports of goods which neither originated in West Virginia nor terminated in West Virginia.

The Petitioner leases, as lessee, and operates a coal loading facility at Kenova, West Virginia, where it unloads railroad

cars and loads river barges through a conveyor system. The Petitioner also owns fleeting sites along the Ohio River in West Virginia, and leases, as lessor, a portion of the property at one fleeting site to a private individual for farming. A fleeting site is an area along the bank of the river where barges may be tied up. Petitioner also owns title to several small miscellaneous tracts of land around the Huntington, West Virginia, terminal owned by an affiliate of the Petitioner, Ohio River Terminals Company. The Petitioner leases, as lessee, a barge fleeting site on the Ohio River in West Virginia at river mile marker 311, and the Petitioner leases, as lessee, automobiles, trucks, and office equipment used at the Kenova, West Virginia, Facility.

The Petitioner has approximately 35 employees at the Kenova facility, and a number of managerial employees and boat crews who on occasion work in West Virginia, as well as sales employees who call upon the Petitioner's customers from time to time in West Virginia. Many of the Petitioner's employees are West Virginia residents.

The Petitioner has filed and paid the West Virginia business and occupation tax, and carrier income tax, when those taxes were applicable, and the West Virginia business franchise tax, corporation net income tax, ad valorem property tax, business registration tax, and consumers sales and service tax and use tax. The Petitioner, during the period in question, held a West Virginia business registration certificate. Companies affiliated with the Petitioner by common ownership own or lease property, have employees, and do business in the State of West Virginia.

ISSUES

The issues to be decided in the matters here in controversy are:

1. Constitutional commerce clause and due process questions:

a. Is the tax here in controversy a direct burden on an instrumentality of interstate commerce in violation of Article 1,

Section 8, Clause 3 of the United States Constitution, the Commerce Clause?

b. Does the tax here in controversy fail to bear any fair relationship to the benefits received by the Petitioner from the State of West Virginia in such a way as to cause the said tax to be unconstitutional?

c. Is the tax here in controversy an unconstitutional burden on interstate commerce in violation of the Commerce Clause and the Due Process Clause of the United States Constitution because the tax is not fairly related to services provided to the Petitioner by the State of West Virginia?

d. Does the tax here in controversy impose a charge on watercraft operating on the navigable waters of the State of West Virginia without corresponding benefit to the Petitioner in such a way that such tax constitutes a duty of tonnage prohibited by Article 1, Section 10 of the United States Constitution.

e. Is the activity of the Taxpayer such that there exists insufficient nexus with the State of West Virginia so as to cause imposition of the tax here in controversy to constitute an unconstitutional burden on interstate commerce in violation of the Commerce Clause and Due Process Clause of the United States Constitution?

f. Is the application of the tax here in controversy such as to deny the Petitioner the equal protection of the law in violation of the Due Process Clause of the United States Constitution and Article 10, Section 1 of the West Virginia Constitution because such tax is purportedly not applied equally and uniformly to all barge operators transporting products in interstate commerce on the Ohio River?

g. Does the tax here in controversy discriminate against interstate commerce in violation of the Commerce Clause and Due Process Clause of the United States Constitution because the statute imposing such tax prior to June 30, 1985, allowed a credit against the tax with respect to tax paid on fuel purchased in the State of West Virginia, but allowed no similar

credit for tax that was or could be imposed by other jurisdictions on fuel purchased outside the State of West Virginia.

2. Is the delegation of authority to the Tax Commissioner set forth in W. Va. Code § 11-15A-13 to determine the average wholesale price of gasoline and special fuel an unlawful delegation of the taxing power of the Legislature in violation of Article 5, Section 1 of the West Virginia Constitution?

3. Is the tax here in controversy invalid as violating the spirit or terms of the Northwest Ordinance and the Virginia Compact, which declare navigable waters forever free?

4. Is the tax here in controversy unlawful and void by reason of the fact that jurisdiction to improve, maintain, regulate and tax navigable waterways has been preempted by the United States government?

5. Is the tax invalid in accordance with the holding of the Kanawha County Circuit Court in the case of *Waterways Association of Pittsburgh v. Rose* (Civil Action No. 84-C-2814, Kanawha County, April 18, 1986), particularly with respect to tax paid by Petitioner on and after July 1, 1985, because the court, in that case, invalidated the tax after June 30, 1985?

ANALYSIS AND DECISION

1. The application of the tax here in controversy meets the requirements of the Commerce Clause and the Due Process Clause of the United States Constitution. The United States Supreme Court adopted a four-part test in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977), for determining whether a tax will be sustained under the Commerce Clause of the United States Constitution. A state tax will be sustained when (1) the tax is applied to activities having substantial nexus with the State, (2) the tax is fairly apportioned, (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly related to the services provided by the State.

There is little argument that the tax is applied to activities having substantial nexus with the State. The record contains

an extensive recitation of the Taxpayer's activities in the State of West Virginia. The Petitioner's ownership and operation of facilities and property in the State of West Virginia, the Petitioner's payment of taxes based upon its activities and operations in West Virginia (other than the tax here in controversy) and the Taxpayer's general utilization of the business climate of West Virginia to its advantage are substantial evidence of the Petitioner's nexus with the State. The tax is fairly apportioned, and there has been no allegation that the State of West Virginia is attempting to tax the use of fuels in any state other than the State of West Virginia. The Taxpayer has agreed to the 15% allowance for movements of its vessels in the Ohio River west of the state boundary as it existed in 1787 as a fair apportionment of tax with relation to that navigational factor.

The tax does not discriminate against interstate commerce pursuant to the internal consistency test announced by the United Supreme Court in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984). The West Virginia consumers sales and use tax scheme for taxing gasoline and special fuel passes the internal consistency test in that if the tax were applied by every jurisdiction, there would be no impermissible interference with free trade. The Petitioner would pay but one sales or use tax measured by the gallons of fuel consumed in its operations in each state. This is due to the W. Va. Code § 11-15A-13(d) computation formula and the W. Va. Code § 11-15A-10a credit.

The tax meets the fourth test under the Complete Auto Transit analysis because the West Virginia consumers sales and use taxes are generally imposed for the general support of government, even though the tax on gasoline and special fuel is deposited in the road fund. There is no requirement under the due process laws that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. The United States Supreme Court has consistently held that a tax is not an assessment of benefits. It is a means of distributing the burden of the cost of government. The only benefit to which a taxpayer is constitutionally entitled is that derived

from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. *Carmichael v. Southern Coal and Coke Company*, 301 U.S. 495, 81 L. Ed. 1245, 57 S. Ct. 868 (1937). The relevant inquiry under the fourth *Complete Auto Transit* test is not the amount of the tax or the value of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is whether the measure of the tax is reasonably related to the extent of the contact of the taxpayer and the State. The taxpayer enjoys the benefits and protections of the State of West Virginia in its operation of its facilities and in the exercise of its business privileges in the State of West Virginia. The Petitioner's enjoyment of these opportunities and protections which are afforded by the State are sufficient to sustain the fourth test of the *Complete Auto Transit* analysis.

The Petitioner alleges that the tax here in controversy constitutes a duty of tonnage prohibited by Article 1, Section 10 of the United States Constitution. The United States Supreme Court discussed duties of tonnage in *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 80 L. Ed. 215 (1935). The Court found that the prohibition against tonnage duties embraces all taxes and duties, regardless of their name or form, which operate to impose a charge for the privilege of entering, trading in or lying in a port. Duties of tonnage basically constitute levies upon the privilege of access by vessels or goods to the parts or to the territorial limits of a state. Duties of tonnage are distinct from charges or fees imposed by a state or authority for services facilitating commerce, such as pilotage, towing charges, and charges for loading and unloading cargos. The West Virginia consumers sales and service tax and use taxes on gasoline and special fuel are paid by virtually every consumer of fuel except governmental entities. This includes motor carriers of every description. The use tax on gasoline and special fuel is imposed on the use of such fuel in the State of West Virginia. The tax is not a user fee or in any way imposed for the privilege of access by vessels, or for entering into, trading in or accessing the territory of the State of West Virginia. It is not a duty of tonnage.

The Petitioner cites Administrative Decision 86-937 RGU as supporting the proposition that the tax here in controversy is somehow unconstitutional by reason of the Petitioner's purported lack of substantial nexus with the State of West Virginia.

The Petitioner seems to be arguing that each and every activity of a business engaged in within the State must be analyzed in strict isolation from all other activities of the business entity in order to determine whether that activity should be subject to State taxation. The Petitioner: owns property in West Virginia, leases property in West Virginia (as lessee and lessor), does one-point and two-point business as well as pass-through business in West Virginia, operates a loading facility and office in West Virginia, employs West Virginia citizens in West Virginia, has business contracts and long extant business relations with West Virginia industrial customers from which the Petitioner derives business income; yet the Petitioner, despite these myriad relations and contacts with the State of West Virginia, would have us blind ourselves to all but the fact that the Petitioner burns its fuel on the Ohio River while traveling in interstate commerce.

We are not constrained to narrow our analysis to question whether the "petitioner's interstate transportation of commodities . . . [has] substantial nexus with the State of West Virginia . . . ." *Petitions For Refund Amendment*, page 1, item 1.a. The analysis of the Petitioner's business nexus with West Virginia will be based upon all of the Petitioner's activities, contacts and relations with the State, and not upon some contorted or limited nexus inquiry.

The Petitioner's business activities in West Virginia, and contact and relations with the State of West Virginia are manifold. The Petitioner has long enjoyed and profited from the benefits, protections and business climate constructed, preserved and maintained by the State of West Virginia. It is solely by judicious application of the powers of government that the organization, protections and continuity crucial to the existence of civilized society may be procured. Those who

enjoy the benefits of government must pay the cost of government. The value derived by the Petitioner from its relations with the State of West Virginia are manifest. The Petitioner has a substantial business nexus with the State of West Virginia.

It appears that, based upon Administrative Decision 86-937 RGU, the Petitioner claims that it is denied the equal protection of the law in violation of the United States Constitution. The Petitioner, and further claims that the tax is not applied equally and uniformly to all barge operators transporting products in interstate commerce on the Ohio River, and the tax is therefore applied in violation of the West Virginia Constitution.

The Petitioner seems to claim that, because one barge company was held not liable for the tax, the Petitioner should likewise be held not liable. Administrative Decision 86-937 RGU was based upon a finding that application of the tax to the Petitioner in that case did not meet the four-part test for lawful imposition of a tax on a person engaging in interstate commerce set forth in *Complete Auto Transit, Inc. v. Brady, supra.* We have already held that application of the tax to the Petitioner in the matters here in controversy specifically meets the requirements of *Complete Auto Transit, Inc. v. Brady.*

Certainly, identically situated taxpayers should receive identical (equal and uniform) tax treatment. With relation to the Petitioner in Administrative Decision 86-937 RGU, the Petitioner herein is not identically, nor, indeed, even similarly situated, and cannot claim inequality of treatment based upon Administrative Decision 86-937 RGU.

The four-part test announced in *Complete Auto Transit, Inc. v. Brady* have all been met by the imposition of tax upon the Petitioner in the matters here in controversy. Therefore, there is no violation of the United States Constitution based upon that application. Administrative Decision 86-937 RGU is not an applicable precedent to support the Petitioner's claim for refund.

2. The Petitioner argues that W. Va. Code § 11-15A-13(c), which directs the Tax Commissioner to determine the average wholesale price of gasoline and special fuel each year, is an unlawful delegation by the Legislature of its power of taxation.

The term "average wholesale price" is defined in W. Va. Code § 11-15A-13(c)(2). The methodology for determining the "average wholesale price" is also set forth in W. Va. Code § 11-15A-13(c). These provisions establish standards whereby the average wholesale price of gasoline and special fuel can be determined. The Tax Commissioner is limited as to the methodology to be employed, but is given certain latitude with relation to the information to be gathered in making the determination.

We observe that this issue was raised in *Waterways Association of Pittsburgh v. Rose*, *supra*, and was decided against the plaintiffs in that proceeding. We find no reason to disagree with the court as to this issue.

3. The tax here in controversy is not prohibited under the terms of the Northwest Ordinance of 1787 nor under the terms of the Virginia Compact of 1789.

In *American Barge Line Company v. Koontz*, 136 W. Va. 747, 68 S.E.2d 56 (1951), the West Virginia Supreme Court held that the Northwest Ordinance and the Virginia Compact do not limit the sovereignty of the State of West Virginia. In *Waterways Association of Pittsburgh v. Rose*, *supra*, the Circuit Court of Kanawha County found that the use tax imposed by W. Va. Code § 11-15A-13 does not violate the Northwest Ordinance or the Virginia Compact. We do not disagree with the court's holding on this issue.

4. The Petitioner argues that jurisdiction over navigable waterways has been preempted by the United States government. The fundamental inquiry in any preemption analysis is whether Congress intended to displace state law. Where a congressional statute does not expressly declare that state law is preempted, and where there is no actual conflict between

what federal law and state law prescribe, the United States Supreme Court has required that there be evidence of a congressional intent to preempt the specific field covered by state law.

The Petitioner has cited no federal statute which prohibits states from imposing a consumers sales and use tax statute on gasoline and special fuel used in watercraft operating on the inland waterway system. Mere imposition of a federal excise tax on fuel consumed in watercraft on inland waterways is insufficient to prohibit imposition of a state consumers sales and use tax on such fuel. West Virginia retains jurisdiction over the Ohio River to the extent that its authority has not been preempted by federal law and to the extent federal law allows states to exercise authority over a river that is part of the inland waterway system.

West Virginia is not preempted from assessing use tax on the fuel which the Petitioner consumes in West Virginia.

5. The Petitioner claims that the tax discriminates against interstate commerce by reason of the fact that, prior to June 30, 1985, the statute, at that time, allowed a credit against the use tax with respect to tax paid on fuel purchased in the State of West Virginia, but the statute allowed no similar credit for tax imposed by other jurisdictions on fuel purchased outside this State. This claim can be related to the holding of the Kanawha County Circuit Court in *Waterways Association of Pittsburgh v. Rose*, *supra*, wherein the court invalidated the use tax for periods after June 30, 1985.

For periods subsequent to June 30, 1985, it is our finding that remedial legislation enacted by the Legislature of the State of West Virginia fully cured any constitutional question relating to the imposition of the West Virginia use tax on gasoline and special fuel for periods subsequent to June 30, 1985, and Petitioner's claims of unconstitutionality based upon the holdings of the Kanawha County Circuit Court in *Waterways Association of Pittsburgh v. Rose* have been rendered invalid by remedial legislation.

DECISION

WHEREFORE, it is the DECISION of the State Tax Commissioner that the two petitions for refund in this matter, aggregating to the amount of $1,062,403.20 plus interest are DENIED.

STATE TAX COMMISSIONER

BY: /s/ Priscilla H. Gay

PRISCILLA H. GAY
DIRECTOR

February 19, 1992

DATE RENDERED

Appendix H

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
KAREN L. LIGHT
State Tax Dept., 1217 Quarrier Street
Charleston, West Virginia 25501
My Commission Expires Nov. 5, 1996

State of WEST VIRGINIA, County of KANAWHA: This is to certify that this is a true and correct copy

/s/ Priscilla H. Gay

HEARING EXAMINER, W.VA. STATE TAX DEPARTMENT

Subscribed and sworn before me this 16th day of April, 1993

/s/ Karen L. Light, Notary Public

My Commission Expires 11/5/96

State Tax Department Of West Virginia

Charleston 25305

BEFORE THE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA

In the Matter of the	)	INTERNAL AUDITING
Petitions of	)	DIVISION
CROUNSE	)	DOCKET NOS. 86-790
CORPORATION	)	RGU, 89-140 RGU,
2626 BROADWAY	)	92-025 RGU,
PADUCAH, KY 42001	)	92-098 RGU
		FILE NO. 61 042 6923 001

PRESIDING HEARING EXAMINER:	Priscilla H. Gay
PETITIONER REPRESENTED BY:	G. Thomas Battle, Attorney
INTERNAL AUDITING DIVISION REPRESENTED BY:	Robert Rodak, Staff Attorney
DATE, TIME AND PLACE OF HEARING:	March 12, 1992, 9:45 a.m. Department of Tax & Revenue 1001 Lee Street Charleston, WV 25301

SYNOPSIS

GASOLINE AND SPECIAL FUELS USE TAX -- Application of the West Virginia gasoline and special fuels use tax which meets the tests set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) will be found constitutional and otherwise valid.

ADMINISTRATIVE DECISION

Crounse Corporation ("Petitioner") has filed gasoline and special fuel use tax ("fuel use tax") returns and paid the tax due under protest. For the period April 1, 1983 through March 31, 1986, Petitioner paid fuel use tax in the amount of $154,078.53. On June 27 and July 18, 1986, Petitioner submitted claims for refund of the fuel use tax paid, plus interest. By letters dated August 12, 1986, Petitioner's claimed fuel use tax overpayments totaling $154,078.53 were denied. Thereafter, Petitioner submitted a timely petition for refund, docketed as number 86-790 RGU, contending that the refund was erroneously denied.

For the period July 1, 1986 through June 30, 1988, Petitioner paid fuel use tax under protest in the total amount of $61,793.11. Petitioner filed a claim for refund for this period on March 10, 1989. The claimed refund was denied by letter

dated April 11, 1989. Petitioner then submitted a timely petition for refund, docketed as number 89-140 RGU, contending that the refund of $61,793.11, plus interest, was unlawfully denied.

Petitioner continued to pay the fuel use tax and for the period July 1, 1988 through June 30, 1990, it paid tax totaling $70,618.17 under protest. On October 22, 1990, a claim for refund was submitted. Petitioner received no answer to this claim. A petition for refund, docketed as number 92-025 RGU, was filed on January 10, 1992 seeking a determination that the fuel use tax refund was lawfully due.

Finally, Petitioner paid fuel use tax for the period July 1, 1990 through December 31, 1991 in the total amount of $39,172.62. As always, the tax was paid under protest and Petitioner submitted a claim for refund of the tax, plus interest, on January 29, 1992. By letter dated March 12, 1992, Petitioner's claimed refund was denied. Thereafter, Petitioner submitted a timely petition for refund, docketed as number 92-098 RGU, contending that the refund of $39,172.62, plus interest, was wrongfully denied.

These four matters, involving a dispute as to the Petitioner's liability for payment of the gasoline and special fuel use tax imposed by Article 15A, Chapter 11 of the West Virginia Code, have been consolidated for hearing and decision. The total amount at issue is $325,662.43, plus interest.

I. FACTS

Crounse Corporation is a Kentucky corporation with its principal office located in Paducah, Kentucky. Its primary business activity is the transportation of bulk commodities, principally coal, on the navigable waters of the United States. Petitioner's operations cover the entire length of the Ohio River, including the portion bordering West Virginia, and also extend to the tributaries of the Ohio River, the Tennessee Tombigee Waterway and the upper and lower Mississippi River.

The Ohio River lies partly within the State of West Virginia and partly within the State of Ohio. The boundary between the two states along the Ohio River was established as the low water mark of the river on the west bank of the Ohio River in 1787 by the Northwest Ordinance. That portion of the Ohio River extending east from the low water mark of the west bank as it existed in 1787 lies within the State of West Virginia.

The Ohio River has been improved since 1787 by way of a network of locks, dams and the dredging of channels, all of which were constructed by and are maintained by the United States Army Corps of Engineers. The establishment of locks and dams on the Ohio River system has caused the low water mark on the west bank of the river to rise, and consequently navigable waters now extend west of the original low water mark of 1787. Consequently, watercraft may now navigate on the Ohio River west of that low water mark of 1787, and in so doing, may travel outside of the boundary of the State of West Virginia while navigating the Ohio River.

Petitioner's watercraft operate within the State of West Virginia while traveling on the Ohio River between River Mile Marker 40 and River Mile Marker 317 while in waters lying east of the low water mark of 1787. Petitioner's watercraft operate outside the State of West Virginia while traveling on the Ohio River between River Mile Marker 40 and River Mile Marker 317 while in waters lying west of the low water mark of 1787.

Petitioner cannot determine precisely when its watercraft are within the State of West Virginia as a result of improvements of dams and locks along the Ohio River which have increased the area now covered by the waters of the river. Based upon information previously presented to the Department of Tax and Revenue, the Department has agreed to a 15% deduction or allowance against the fuel use tax to compensate for watercraft operating outside West Virginia on the Ohio River between River Mile Markers 40 and 317.

Petitioner took this allowance into account when filing its West Virginia fuel use tax returns.

Petitioner owned its towboats and barges during the refund period. It normally had 14 of its 21 towboats in operation at any one time. The size of the barge fleet increased from approximately 500 to 668 during the refund period.

The sole means of power for navigation of Petitioner's watercraft is gasoline or special fuel. The amount of fuel used and consumed by watercraft operated by Petitioner to transport products on the Ohio River and other navigable rivers in West Virginia increases as the size and weight of the vessel increases. Petitioner does not purchase fuel from suppliers in West Virginia and does not maintain a fuel inventory in this State.

Petitioner handles three types of barge movements or traffic on the Ohio River. One point traffic is where the origin or destination of the barge is in West Virginia; two point traffic is where both origin and destination are in West Virginia; and, no point or pass-through traffic is where neither the origin nor the destination is in West Virginia, but the towboat and barges pass through West Virginia between the points of origin and destination. During the periods at issue, Petitioner's business that came within West Virginia may be divided into the following approximate percentages: one point traffic - 72%; two point traffic - 2%; and, pass-through traffic - 27%.

The United States government has responsibility for the regulation, servicing and maintenance of the inland navigable waterways system, of which the Ohio River is part.

Petitioner files Form 720, the quarterly federal excise tax return, with the Internal Revenue Service, and Petitioner pays a fuel use tax pursuant to Section 4042 of the Internal Revenue Code, Title 726 U.S.C., on the same fuel subject to the fuel use tax imposed by the State of West Virginia. The State of West Virginia allows no credit for taxes paid to the United States government, Internal Revenue Service, for the fuel consumed by the Petitioner's watercraft used in its river

transportation business. The total amount of such federal fuel use tax paid by the Petitioner for the periods at issue are as follows:

TAX PERIOD	AMOUNT
4/1/83 - 3/31/86	$242,108.26
7/1/86 - 6/30/88	134,356.06
7/1/88 - 6/30/90	142,997.72
7/1/90 - 12/31/91	95,698.24

The Petitioner has filed returns as required under the provisions of House Bill 1657 and has paid tax, under protest, on fuel consumed in its watercraft on the Ohio River between river mile marker 40 and river mile marker 317. The denial of Petitioner's claims for refund has resulted in the tax being paid with respect to all gasoline and special fuel used and consumed by the Petitioner's watercraft operating in West Virginia waters. The Petitioner has never sought to apply any credit against the tax imposed by W. Va. Code § 11-15A-13 for sales tax paid in another state because it has paid no sales tax to another state on fuel consumed in West Virginia.

Petitioner's towing activities in West Virginia include the pick-up, delivery and transportation of its own barges. Depending upon the docking location, Petitioner may pick-up and deliver its barges using its own towboats or it may engage independent contractors to make the final delivery to docks located on smaller rivers such as the Kanawha, Big Sandy and Monongahela. When this latter method is used, barges may be removed from the tow in midstream or may be delivered by Petitioner to a fleet, an area where barges are parked, for pick-up by the contract carrier.

In completing its primary business activity of river transportation, Petitioner's employees occasionally travel to West Virginia to visit the U.S. Army Corp of Engineers, the Coast Guard or its customers. Such visits average less than one man-day per week. Additionally, towboat crew changes may

occur at locks located in West Virginia. At times, light supplies and provisions are brought aboard at these same locks. In the event of a medical emergency, Petitioner's employees would make use of West Virginia medical facilities. Likewise, Petitioner's employees would make use of other government services, such as fire protection, if the need arose while in West Virginia waters. Petitioner has defended one civil action in the West Virginia court system.

Petitioner has no telephone listings in West Virginia nor does it provide a toll-free telephone line for its West Virginia customers. Neither does Petitioner maintain any bank accounts, safety deposit boxes or post office boxes in West Virginia. Petitioner does lease approximately 2,000 lineal feet along the Kanawha River in Putnam County, West Virginia for the sole purpose of staging barges for lockage through the Winfield, West Virginia locks. Petitioner did file West Virginia corporation net income, business franchise and carrier income tax returns for the periods covered by the refund claims. No West Virginia withholding taxes were remitted, however.

Based upon these facts, Petitioner contends that the West Virginia fuel use tax is invalid as applied to its towboat operations as being in violation of the Supremacy Clause, the Due Process Clause, the Commerce Clause and the Duty of Tonnage Clause of the United States Constitution, the Constitution of West Virginia, the Northwest Ordinance and the Virginia Compact.

ISSUES

The issues to be decided in the matters here in controversy are:

1. Whether the fuel use tax is unlawful and void by reason of the fact that jurisdiction to improve, maintain, regulate and tax navigable waterways has been preempted by the United States government?

2. Whether the fuel use tax is an unconstitutional burden on interstate commerce in violation of the Commerce Clause and the Due Process Clause of the United States Constitution?

3. Whether the fuel use tax constitutes a duty tonnage prohibited by Article I, Section 10, Clause 3 of the United States Constitution?

4. Whether the fuel use tax is invalid as violating the terms of the Northwest Ordinance and the Virginia Compact which declare navigable waters forever free?

5. Whether the delegation of authority to the Tax Commissioner set forth in W. Va. Code § 11-15A-13 to determine the average wholesale price of gasoline and special fuel is an unlawful delegation of the taxing power of the Legislature in violation of Article 5, Section 1 of the West Virginia Constitution?

DISCUSSION

A. Is the Fuel Use Tax Invalid Because Jurisdiction Over Navigable Waterways Has Been Preempted by the United States Government?

Petitioner contends that West Virginia's imposition of a use tax on fuel consumed in vessels operating on inland navigable waterways is invalid because the state is imposing a tax in a field preempted by the United States government. Petitioner argues that federal legislative actions taken pursuant to Constitutional authority and federal administrative actions authorized by Congress in the area of navigable waterways is so comprehensive and pervasive that states are left with no duties or responsibilities. Thus, states have no authority to impose a use tax on fuel used in vessels operating on inland waterways.

Petitioner acknowledges that the fundamental inquiry in any preemption analysis is whether Congress intended to displace state jurisdiction. In a matter such as this, where Congress has not expressly declared that state law is to be preempted, the United States Supreme Court has required

evidence of a congressional intent to "occupy the field" covered by state law. *Wardair Canada v. Florida Department of Revenue*, 477 U.S. 1 (1986). Petitioner asserts that extensive congressional actions along with actions of federal agencies clearly evidences the federal government's intent to occupy the field of waterway governance.

The basic premise relied upon by Petitioner, found in *Wardair Canada, supra*, was stated by the Court as follows:

> "[S]tate law is not pre-empted whenever there is a federal regulation of an activity or industry or area of the law. The Supremacy Clause, among other things, confirms that when Congress legislates within the scope of its constitutionally granted powers, that legislation may displace state law, and this Court has throughout the years employed various verbal formulations in identifying numerous varieties of pre-emption. See, e.g. *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. 355, 368-369, 90 L. Ed. 2d 369, 106 S. Ct. 1980 (1986). But we have consistently emphasized that the first and fundamental inquiry in any preemption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is to be pre-empted, and where there is no actual conflict between what federal law and state law prescribed, we have required that there be evidence of a congressional intent to pre-empt the specific field covered by state law. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n.*, 461 U.S. 190, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984)." *Wardair Canada, supra* at 6.

Accordingly, Petitioner must demonstrate at least one of three notions in order to prevail in its attempt to establish federal preemption: (1) where federal legislation expressly

declares that state law is to be preempted [Petitioner acknowledges no such legislative declaration is present in this matter]; (2) where there is an actual conflict between what federal law and state law prescribed [Petitioner has not raised this in its arguments]; or (3) where there is evidence of congressional intent to preempt the specific field covered by state law [the basis of Petitioner's argument]. Clearly, Petitioner has not positively demonstrated 1 or 2 above. This tribunal must determine whether Petitioner has established congressional intent to preempt state taxation of fuel consumed in vessels operating on the inland waterways.

Petitioner's position relies upon the federal government's exclusive responsibility for the creation, maintenance, improvement and regulation of the inland waterway system coupled with enactment of a federal fuel use tax, 26 U.S.C. § 4042. The revenue generated from the federal fuel tax is dedicated to maintaining and regulating the waterways. Petitioner asserts that the United States Congress, having enacted legislation under which the federal government assumes exclusive responsibility and jurisdiction for constructing, maintaining, regulating and rehabilitating inland and intercoastal waterways, and also having imposed a tax on fuel consumed on such waterways which is dedicated to such construction and rehabilitation, has demonstrated its intent to exclude state action on the same activities.

Clearly the law requires the Petitioner to prove "a congressional intent to pre-empt the *specific* field covered by state law." *Wardair Canada, supra* [emphasis added]. Petitioner's evidence shows the preemption of responsibility for the creation, maintenance, improvement and regulation of the inland waterway system by the federal government. It further shows a federal funding mechanism dedicating revenue to pay for those responsibilities.

Petitioner's evidence does not, however, prove federal preemption of a state's taxing authority. Mere imposition of a federal excise tax on fuel consumed in watercraft navigating on inland waterways is insufficient to prohibit a state

consumers sales and use tax on such fuel. West Virginia retains jurisdiction over the Ohio River to the extent that its authority has not been preempted by federal law and to the extent that federal law allows states to exercise authority over a river that is part of the inland waterway system.

Accordingly, it is determined that West Virginia is not preempted from assessing use tax on the fuel which Petitioner consumes in West Virginia.

B. Is the Fuel Use Tax an Unconstitutional Burden on Interstate Commerce?

Petitioner contends that West Virginia's fuel use tax is an unconstitutional burden on interstate commerce in violation of the Commerce Clause and the Due Process Clause of the United States Constitution. The statute at issue, W. Va. Code § 11-15A-13, imposes a tax on motor carriers measured by their consumption of fuel in West Virginia. "Motor carrier" is defined to include a barge or other watercraft transporting passengers or freight in or through West Virginia. The tax, calculated at five percent of the "average wholesale price" of fuel is dedicated to the repair and maintenance of the highways in West Virginia. W. Va. Code § 11-15A-13(g).

Both parties to this controversy agree that the matter is controlled by the United States Supreme Court decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Applying the holding of that decision to the case at hand results in the two parties reaching opposite conclusions. Petitioner argues that West Virginia's fuel use tax fails to meet the requirements of the Commerce Clause test set forth in *Complete Auto Transit*. The Division argues that the state tax passes the test.

The Supreme Court adopted a four part test in *Complete Auto Transit* for determining whether a tax will be sustained under the Commerce Clause of the United States Constitution. A tax is valid if it satisfies the following criteria:

> (1) the tax is applied to activities having substantial nexus with the state;

(2) the tax is fairly apportioned;

(3) the tax does not discriminate against interstate commerce; and

(4) the tax is fairly related to the services provided by the state.

Petitioner asserts that the fuel use tax fails the "substantial nexus," "discrimination" and the fairly related to services provided" parts of the test. Therefore, Petitioner concludes that the tax is an impermissible burden on interstate commerce.

The Commerce Clause requires the activity to which a state tax applies to have a substantial nexus with the state. "Nexus" has long been defined as simply requiring a "minimal connection" or a definite link between the taxing state and the person or transaction the state seeks to tax.

The record contains extensive recitation of the Petitioner's activities in the State of West Virginia. Nearly 74% of its river transportation activity includes either the pick-up or delivery of barges to or from a West Virginia location. The remainder of its river transportation business is pass through activity.

On the Ohio River, Petitioner usually picks-up or delivers barges directly to the dock. The Petitioner retains independent contractor towing companies to transport its barges up and down the Kanawha, Big Sandy and Monongahela Rivers.

Petitioner also engages in mid-stream exchanges of barges in West Virginia. Barges are added to or taken off Petitioner's tow. Many times this is accomplished through the use of an independent contracted harbor service.

Petitioner made pick-up or deliveries, either directly itself, or through the use of contract haulers, at approximately five (5) to ten (10) West Virginia locations on the Ohio River, ten (10) to fifteen (15) locations on the Kanawha River and a couple on the Monongahela River.

All of Petitioner's barges remain in the care and custody of its customers in West Virginia. Accordingly, property of the Petitioner is more or less constantly located in the State of West Virginia. Depending upon the circumstances, Petitioner may charge demurrage for the time the barges are located in West Virginia.

In furtherance of its river transportation activities, Petitioner's employees visit West Virginia on the average of one man-day per week. The employees meet with customers, Coast Guard and Corp of Engineer personnel.

Additionally, Petitioner's employees may board or unboard barges in West Virginia. Petitioner may also use West Virginia locations for loading provisions and light supplies.

Petitioner admits having substantial nexus with West Virginia and concedes by paying "doing business taxes" because of its activities in the state, the business privilege exercised and income generated by that activity are properly subject to the taxing jurisdiction of West Virginia. Petitioner contends, however, that the activity taxed by W. Va. Code § 11-15A-13, i.e. the consumption of fuel by Petitioner's towboats engaged in interstate commerce on the navigable waterways in West Virginia, does not have substantial nexus with the state as required by the Commerce Clause. Thus, Petitioner argues that the mere consumption of fuel is not enough to create substantial nexus.

Petitioner's activities must be looked at as a whole and not segregated as Petitioner asserts. Petitioner has chosen to do business in West Virginia. Petitioner's activities take place within the boundaries of the State of West Virginia. It services a number of customers at various locations. In providing its services, Petitioner's business property has an essentially continuous presence in this state. All of the activities cited above are such as to create a substantial business nexus with the State of West Virginia.

The tax is fairly apportioned, and there has been no allegation that the state of West Virginia is attempting to tax the use

of fuels in any state other than the state of West Virginia. The Petitioner has agreed to the 15% allowance for movement of its vessels on the Ohio River west of the state boundary as it existed in 1787 as a fair apportionment of tax with relation to this navigational factor.

Petitioner argues that the fuel use tax discriminates against interstate commerce because tax was paid on fuel consumed in its towboats that pass through the state. Petitioner asserts that the tax was held inapplicable to pass-through traffic of an interstate barge towing company with no office or other activity in West Virginia. W. Va. Tax Dec. 86-937 RGU.

W. Va. Tax Dec. 86-937 RGU was based upon the fact that the record in that matter had insufficient evidence to permit the Office of Hearings and Appeals to conclude that imposition of the tax in that case met the *Complete Auto Transit* four part test for lawful imposition of a state tax on a person engaging in interstate commerce. The holding was not, as Petitioner alleges, that the tax was inapplicable to pass-through traffic.

The fuel use tax does not discriminate against interstate commerce pursuant to the internal consistency test announced by the United States Supreme Court in *Armco v. Hardesty*, 467 U.S. 638 (1984). The West Virginia consumers sales and service and use tax scheme for taxing gasoline and special fuel passes the internal consistency test in that, if the tax were applied by every jurisdiction, there would be no impermissible interference with free trade. The Petitioner would pay but one sales or use tax measured by the gallons of fuel consumed in its operations in each state. This is because of the W. Va. Code § 11-15A-13 (d) computation formula and the W. Va. Code § 11-15A-10a credit.

The fourth part of the *Complete Auto Transit* test is that the tax must be fairly related to the services provided by the state. Petitioner's argument is that since the fuel use tax is dedicated to the highway fund, Petitioner who operates on the state's rivers, receives no benefits fairly related to the tax paid.

The fuel use tax meets the fourth *Complete Auto* test even though the fuel use tax is deposited in the road fund. There is no requirement under the due process laws that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. The United States Supreme Court has consistently held that a tax is not an assessment of benefits. It is a means of distributing the burden of the cost of government. The only benefit to which a taxpayer is constitutionally entitled is that derived from his enjoyment of the privilege of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. *Carmichael v. Southern Coal and Coke Company*, 301 U.S. 495 (1937).

The relevant inquiry under the fourth test is not the amount of the tax or the value of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is whether the measure of the tax is reasonably related to the extent of the contact of the taxpayer and the state. The Petitioner enjoys the benefits and protections of the State of West Virginia in its operations and in the exercise of its business privileges in the State of West Virginia. The Petitioner's enjoyment of these opportunities and protections which are afforded by the State are sufficient to sustain the fourth test of the *Complete Auto Transit* analysis.

The four tests announced in *Complete Auto Transit v. Brady* have all been met by the imposition of the fuel use tax upon the Petitioner in the matters here in controversy. Accordingly, it is determined that the fuel use tax is not an unconstitutional burden on interstate commerce in violation of the Commerce Clause and Due Process Clause of the United States Constitution.

C. Is the Fuel Use Tax a Prohibited Duty of Tonnage?

The Petitioner alleges that the fuel use tax constitutes a duty of tonnage prohibited by Article 1, Section 10 of the United States Constitution. The United States Supreme Court discussed duties of tonnage in *Clyde Mallory Lines v.*

Alabama, 296 U.S. 261 (1935). The Court found that the prohibition against tonnage duties embraces all taxes and duties, regardless of their name or form, which operate to impose a charge for the privilege of entering, trading in or lying in a port.

Duties of tonnage basically constitute levies upon the privilege of access by vessels or goods to the parts or to the territorial limits of a state. Duties of tonnage are distinct from fees or charges imposed by a state or authority for services facilitating commerce, such as pilotage, towing charges, and charges for loading and unloading cargos.

The West Virginia consumers sales and service and use taxes on gasoline and special fuels are paid by virtually every consumer of fuel except governmental entities. This includes motor carriers of every description. The fuel use tax is imposed on the use of such fuel in the State of West Virginia. The tax is not a user fee or in any way imposed for the privilege of access by vessels, or for entering into, trading in or accessing the territory of the State of West Virginia. Therefore, the fuel use tax is not a duty of tonnage. Accordingly, there is no constitutional prohibition to its imposition by the State of West Virginia.

D. Is the Fuel Use Tax Invalid Because it Violates the Terms of the Northwest Ordinance and the Virginia Compact?

Petitioner contends that the provisions of the Northwest Ordinance and the Virginia Compact prohibit West Virginia from collecting the fuel use tax.

The West Virginia Supreme Court of Appeals has held that the Northwest Ordinance and the Virginia Compact were superseded by the adoption of the United States Constitution and therefore, the compacts do not limit the sovereignty of the State of West Virginia. *American Barge Line Company v. Koontz*, 136 W. Va. 747, 68 S.E.2d 56 (1951).

Further, in *Waterways Association of Pittsburgh v. Rose*, Civil Action No 84-C-2814 (Kanawha County Cir. Ct. April 18, 1986), the circuit court found that the fuel use tax imposed

by W. Va. Code § 11-15A-13 does not violate the Northwest Ordinance or the Virginia Compact. There is no reason for this tribunal to disagree with the court's holding on this issue.

E. Is the Delegation of Authority to the Tax Commissioner to Determine the Average Wholesale Price of Gasoline and Special Fuel an Unlawful Delegation of the Taxing Power of the Legislature?

Petitioner argues that W. Va. Code § 11-15A-13(c), which directs the Tax Commissioner to annually determine the "average wholesale price" of gasoline and special fuel, is an unlawful delegation of the Legislature of its power of taxation which violates a fundamental constitutional notion of separation of powers among the three branches of government.

Both the consumers sales and use taxes imposed on gasoline and special fuel are based upon the average wholesale price of gasoline and special fuels. That price is determined annually by the Tax Commissioner pursuant to a statutory grant of authority. W. Va. Code § 11-15A-18(b) and § 11-15A-13(a).

The term "average wholesale price" is defined in W. Va. Code § 11-15A-13(c)2. The methodology for determining the average wholesale price is set forth in W. Va. Code § 11-15A-13(c). These provisions establish the standards set by the Legislature for determination by the Tax Commissioner of the average wholesale price. Clearly the Tax Commissioner is limited to the mandated methodology for calculation of the average wholesale price.

This identical issue has previously been raised in *Waterways Association of Pittsburgh v. Rose*, *supra*, and was decided against the plaintiffs in that proceeding. The court found that the Tax Commissioner's authority was not an unlawful delegation of legislative power. This Office finds no reason to disagree with the court as to this issue.

DECISION

WHEREFORE, it is the Decision of the Tax Commissioner of the State of West Virginia that the four petitions for refund in this matter, aggregating to the amount of $325,662.43, plus interest, should be and are hereby DENIED.

STATE TAX COMMISSIONER

By: /s/ Priscilla H. Gay

Priscilla H. Gay
Director
Office of Hearings and Appeals

January 26, 1993
Date

Appendix I

West Virginia Statutes Involved*

§ 11-15A-13. Tax on gasoline and special fuel.

(a) *Imposition of tax.*

(1) *On deliveries in this state.* — Gasoline or special fuel furnished or delivered within this state to consumers or users is subject to tax at the rate imposed by section two [§ 11-15A-2] of this article: Provided, That the amount of tax due under section two shall in no event be less than five percent of the average wholesale price of gasoline and special fuel and with such price to, in no case, be deemed to be less than ninety-seven cents per gallon for all gallons of gasoline and special fuel taxable under section two of this article.

(2) *On purchases out of state.* — An excise tax is hereby imposed on the use or consumption in this state of gasoline or special fuel purchased outside this state at the rate of five percent of the average wholesale price of such gasoline or special fuel, as determined under subsection (c), notwithstanding any provision of this article to the contrary: Provided, That gasoline or special fuel contained in the supply tank of a motor vehicle that is not a motor carrier shall not be taxable, except that gasoline or special fuel imported in the supply tank or auxiliary tank of construction equipment, mining equipment, track maintenance equipment or other similar equipment, shall be taxed in the same manner as that in the supply tank of a motor carrier.

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* The statutes in effect for the years at issue (1983-91), which were amended over the years in minor respects having no bearing upon the controversy before this Court, are substantially similar to the current statutes reproduced herein. It is noted that § 11-15A-13(j) was added in 1986, retroactive to July 1, 1985.

(b) *Definitions.* — Terms used in this section shall have the same meaning as when used in a comparable context in section eighteen [§ 11-15-18], article fifteen of this chapter.

(c) *Determination of average wholesale price.*

(1) To simplify determining the average wholesale price of all gasoline and special fuel, the tax commissioner shall, effective with the period beginning the first day of the month of the effective date of this section and each first day of January, annually, thereafter, determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered for the preceding period of the first day of July through the thirty-first day of October. Notification of the average wholesale price of gasoline and special fuel shall be given by the tax commissioner at least thirty days in advance of each first day of January, annual period, by filing notice of the average wholesale price in the state register, and by such other means as the tax commissioner deems reasonable: Provided, That notice of the average wholesale price of gasoline and special fuel for the first period shall be timely given if filed in the state register on the effective date of this section.

(2) The "average wholesale price" shall mean the single, statewide average per gallon wholesale price, rounded to the third decimal (thousandth of a cent), exclusive of state and federal excise taxes on each gallon of gasoline or diesel fuel, as determined by the tax commissioner from information furnished by distributors of gasoline or special fuel in this state, or such other information regarding wholesale selling prices as the tax commissioner may gather, or a combination of such information: Provided, That in no event shall the average wholesale price be determined to be less than ninety-seven cents per gallon of gasoline or special fuel.

(3) All actions of the tax commissioner in acquiring data necessary to establish and determine the average wholesale price of gasoline and special fuel, in providing notification of his determination prior to the effective date of any change in rate, and in establishing and determining the average

wholesale price of fuel, may be made by the tax commissioner without compliance with the provisions of article three [§ 29A-3-1 et seq.], chapter twenty-nine-a of this code.

(4) In any administrative or court proceeding brought to challenge the average whole price of gasoline and special fuel as determined by the tax commissioner, his determination shall be presumed to be correct and shall not be set aside unless it is clearly erroneous.

(d) *Computation of tax due from motor carriers.* — Every person who operates or causes to be operated a motor carrier in this state shall pay the tax imposed by this section on the average wholesale price of all gallons of gasoline or special fuel used in the operation of any motor carrier within this state, under the following rules:

(1) The total amount of gasoline or special fuel used in the operation of the motor carrier within this state shall be that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this state, that the total number of miles traveled within this state bears to the total number of miles traveled within and without this state.

(2) A motor carrier shall first determine the gross amount of tax due under this section on the average wholesale value, determined under subsection (c), of all gasoline and special fuel used in the operation of the motor carrier within this state during the preceding quarter, as if all gasoline and special fuel had been purchased outside this state.

(3) Next, the taxpayer shall determine the total tax paid under article fifteen [§ 11-15-1 et seq.] of this chapter on all gasoline and special fuel purchased in this state for use in the operation of the motor carrier.

(4) The difference between (2) and (3) is the amount of tax due under this article when (2) is greater than (3), or the amount to be refunded or credited to the motor carrier when (3) is greater than (2), which refund or credit shall be allowed in the same manner and under the same conditions as a refund

or credit is allowed for the tax imposed by article fourteen-a [§ 11-14A-1 et seq.] of this chapter.

(e) *Return and payment of tax.* — Tax due under this article on the uses or consumption in this state of gasoline or special fuel shall be paid by each taxpayer on or before the twenty-fifth day of January, April, July and October of each year, notwithstanding any provision of this article to the contrary, by check, bank draft, certified check or money order, payable to the tax commissioner, for the amount of tax due for the preceding quarter. Every taxpayer shall make and file with his remittance, a return showing such information as the tax commissioner may require.

(f) *Compliance.* — To facilitate ease of administration and compliance by taxpayers, the tax commissioner may require motor carriers liable for the taxes imposed by this article on the use of gasoline or special fuel in the operation of motor carriers within this state, and the tax imposed by article fourteen-a of this chapter on such gallons of fuel, to file a combined return and make a combined payment of the tax due under this article and article fourteen-a of this chapter on such fuel. In order to encourage use of a combined return and the making of a single payment each quarter for both taxes, the due date of the return and tax due under article fourteen-a of this chapter is hereby changed from the last day of January, April, July and October of each calendar year, to the twenty-fifth day of such months, notwithstanding any provisions in article fourteen-a of this chapter to the contrary.

(g) *Dedication of tax to highways.* — All tax collected under the provisions of this section after deducting the amount of any refunds lawfully paid shall be deposited in the "road fund" in the state treasurer's office, and shall be used only for the purpose of construction, reconstruction, maintenance and repair of highways, and payment of principal and interest on state bonds issued for highway purposes.

(h) *Construction.* — The tax imposed by this article on the use of gasoline or special fuel in this state shall not be construed as taxing any gasoline or special fuel which the state is

prohibited from taxing under the constitution of this state or the constitution or laws of the United States.

(i) *Effective date.* — The provisions of this section and the amendments to section three [§ 11-15A-3] of this article took effect on the first day of April, one thousand nine hundred eighty-three.

(j) *Validation.* — Inasmuch as there is currently litigation challenging the lawfulness of this section in the situation where a motor carrier purchases gasoline or special fuel in another state paving to that other state a sales tax thereon and then consumes that gasoline or special fuel in its operation of a motor carrier in this state, without being statutorily allowed a credit for such sales tax against the tax imposed by this article with respect to such gallonage of tax paid fuel consumed in this state; and inasmuch as section ten-a [§ 11-15A-10a] of this article reestablishes the allowance of such a credit and makes such allowance effectively retroactive and applicable to gasoline and special fuel consumed in this state after the thirtieth day of June, one thousand nine hundred eighty-five, the purported constitutional infirmity is cured. To avoid any question about whether this section was in effect subsequent to the thirtieth day of June, one thousand nine hundred eighty-five, this section is reenacted and expressly made retroactive to the first day of July, one thousand nine hundred eighty-five, and the tax commissioner shall not refund or credit any tax previously paid under this section due to a claim that the tax was not lawfully imposed subsequent to the thirtieth day of June, one thousand nine hundred eighty-five.

§ 11-15-18. Tax on gasoline and special fuel.

* * * *

(c) *Definitions.* — For purposes of this section:

* * * *

(4) "Gasoline" shall mean and include any product commonly or commercially known as gasoline, regardless of classification, suitable for use as fuel in an internal combustion engine, except special fuel as hereinafter defined, including any product obtained by blending together any one or more products, with or without other products, if the resultant product is capable of the same use.

* * * *

(6) "Motor carrier" shall mean and include: (A) Any passenger vehicle which has seats for more than nine passengers in addition to the driver, any road tractor, tractor truck or any truck having more than two axles, which is operated or caused to be operated, by any person on any highway in this state using gasoline or special fuel; and (B) any aircraft, barge or other watercraft, or locomotive transporting passengers or freight in or through this state.

* * * *

(9) "Special fuel" shall mean and include any gas or liquid, other than gasoline, used or suitable for use as fuel in an internal combustion engine. The term "special fuel" shall include products commonly known as natural or casinghead gasoline and shall include gasoline and special fuel for heating any private residential dwelling, building or other premises; but shall not include any petroleum product or chemical compound such as alcohol, industrial solvent, heavy furnace oil, lubricant, etc., not commonly used nor practicably suited for use as fuel in an internal combustion engine.

* * * *

(13) "User" shall mean any person who purchases gasoline or special fuel for use or consumption.